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CURRENT EVENTS.

OUR readers will, we trust, pardon a few words of a personal nature, which seem appropriate in view of some recent changes in the editorial management of this JOURNAL. In what we shall say, it is not our intention to reflect unfavorably upon its past management, which has been of a high order, the best evidence of which is seen in its extended reputation, its large circulation—the largest, probably, of any law journal in the world—and the constantly increasing demand for the JOURNAL.

But there is an old Irish bull, which applies as well to law journals as to individuals that, "if you want to be as good a man as your father, you have got to be a better one." So, we recognize the fact that, if we want to publish as good a journal as that edited, in successive periods, by Judge Dillon, Judge Thompson and Mr. Lawson, we must, at least, endeavor to prepare a better one. All of these considerations challenge our greatest effort. And this, at least, we propose to give. Our aim will be to extend the value and usefulness of the JOURNAL, by elevating its editorial standard, by presenting, in the most attractive and readable shape, the current legal thought of the country, and by the publication only of that, which is peculiarly the province of a law journal—fresh legal news. We propose, as far as possible, to give our readers that which they cannot find in text-books, of which we might claim to be the forerunner or advance sheets, and to place weekly in the hands of the busy practitioner a rich compendium of current law.

AN article on the "local prejudice" clause of the new Removal of Causes act, prepared by Judge Maxwell of the Supreme Court of Nebraska, will be found on another page of this issue. It is readable, not only on account of the ability of the writer, but also by reason of the very great interest in the sub-

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ject, induced by the general ignorance, or at least misapprehension of the profession as to the meaning, scope and proper construction of that act. Indeed, the universal belief among federal practitioners is, that the authors and framers of that law know even as little about it. The practice under the clause referred to is considerably changed from the old law, especially in regard to the mode in which prejudice or local influence need be alleged and shown, as Judge Maxwell clearly points out.

It will be borne in mind, that the act as passed in March, 1887, was, on its enrollment, found seriously defective in many particulars of spelling, punctuation, etc., such as the repeated substitution of "controversary," for the word "controversy." The errors were such and so numerous as to materially interfere with a proper interpretation of the act. In response to the outcry on the part of the profession congress, in August, 1888, passed an act to correct the enrollment of the former act, but which is substantially the same act. This act of August, 1888, and which is the one now in force, we print in full, following the article of Judge Maxwell, thinking that our readers are interested in knowing its exact phraseology and provisions.

WE have received from a number of our readers inquiries as to the scope, effect and general construction of the late act of congress of September 26, 1888, making it an offense to prepare and put in the mail a postal card or envelope upon which anything of a defamatory or objectionable nature appears, in other words, the law aimed principally at improper public "dunning;" and as the act is of general interest, and its interpretation unsettled, we are led to offer some observations in reference to it. The act in question provides: "That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which any delineations, epithets, terms or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory or threatening character, or calculated by the terms or manner or style of display, and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed, or other-

wise impressed or apparent, are hereby declared non-mailable, etc., and any person knowingly depositing for mailing * * * shall be fined," etc. We are aware of but one ruling under this law, and that by Judge Blodgett, of the United States District Court at Chicago. The indictment was against Sprague—president of a collection agency—and charged him with mailing a certain letter, upon the envelope of which was printed in large black letters, "Sprague's Collection Agency." The judge held this did not come under the law.

Of course it will be impossible to say, except upon the facts of each case, what would or would not be considered as within the meaning of the law. But a study of the language of the statute will enable one readily to determine, in a general way, the underlying principle that ought to govern. There is, undoubtedly, a proper, gentlemanly and decent way of reminding a debtor of his obligation. This, the law, certainly does not aim at. Any language or device, printed or written, which is threatening in character and liable to bring a man into bad odor or disrepute, or intended to reflect injuriously upon his character, is contemplated by the statute.

The law, we feel sure, has not in mind to discountenance the proper collection of debts, but seeks only to prevent the disseminator of libels on unfortunate debtors.

THE Supreme Court of the United States will doubtless be called on shortly to determine the legal *status* of the interstate commerce commission, and define the scope of its powers. The opportunity will be afforded in the case of the Kentucky & Indiana Bridge Company v. L. & N. Ry. Co., recently decided by the United States circuit court at Louisville, reviewing the previous ruling of the commerce commission. The bridge company's charter authorized it to construct railroad tracks over its bridge, to connect with other railroad lines, and to do a transportation business with its own locomotives as a connecting link between those lines. The company itself claims to be a common carrier, and actually engaged in such transportation business as is authorized by its charter. A clause in the interstate com-

merce law provides that the term railroad, as used in that act, "shall include all bridges and ferries owned or operated in connection with any railroad." The interstate commerce commission, through chairman Cooley, one member dissenting, decided that the bridge company was a common carrier, and, as such, was entitled to equal facilities with those furnished to other common carriers.

Judge Jackson, of the United States court, holds that the bridge company is not a common carrier, and he also declares, that the commission does not constitute a court for any purpose, but is merely an advisory body, whose findings are to be regarded merely as recommendations. As to the first point, and the one really at issue, the supreme court will probably find little difficulty in reversing Judge Jackson. On the question of the *status* of the commission, the profession will look eagerly for an enunciation from the court of last resort.

NOTES OF RECENT DECISIONS.

In the case of *Metcalf v. City of Watertown*, 9 S. C. Rep. 173, the Supreme Court of the United States restrict somewhat, as compared with former rulings, the jurisdiction of the United States circuit court. It was there held that an action on a judgment of a court of the United States, is not necessarily an action arising under the constitution or laws of the United States, and therefore the circuit court cannot take original cognizance of it on that ground. To bring it in that class of cases, there must be some averment showing that a federal question will really be involved.

A still more important point for the attention of the practitioner, is presented in the same case, viz: that, although often decided by that court that a suit may be said to arise under the constitution or laws of the United States, within the meaning of the act, even where the federal question upon which it depends, is raised, for the first time in the suit, by the answer or plea of the defendant, yet such ruling was made in removal cases in which the grounds of federal jurisdiction were disclosed, either in the pleading or petition for removal; and that the case at the time the jurisdiction of the circuit court at-

tached, by removal, clearly presented questions of federal nature (citing *R. R. Co. v. Miss.*, 102 U. S. 135; *Ames v. Kansas*, 111 U. S. 449; *Removal Cases*, 115 U. S. 1, 11). But where the original jurisdiction of the circuit court of the United States is invoked, upon the sole ground, that the determination of the suit depends upon some question of a federal nature, it must appear, at the outset, from the petition of the party suing, that the suit is of that character. In other words, it must appear, in that class of cases, that the suit was one, of which the circuit court at the time its jurisdiction is invoked could properly take cognizance.

In the case of *Deshon v. Wood*, 19 N. E. Rep. 1, the Supreme Judicial Court of Massachusetts pass upon an interesting question of fraudulent conveyances. This was a bill in equity brought by an assignee of an insolvent, to apply for the benefit of the insolvent estate, certain bonds conveyed by the insolvent to his wife, the defendant. The bonds were delivered by the husband to the wife before the marriage, to become her property on the consummation of the marriage as a settlement. The court holds that it was simply an executory contract to transfer them on the marriage; made in consideration of it, and not being in writing, it could not, under the statute of frauds, be enforced, and its performance by the husband after marriage was, therefore, voluntary and void as against his creditors; that the transfer was also void as an antenuptial contract under statute providing for such contracts, and which statute requires that the contract shall be recorded, and if not recorded it shall be void. When the bonds were given he was insolvent, and the agreement having been made without any valuable consideration it was void, though she did not participate in any actual intent to hinder and defraud. The dissenting opinion of Allen, J., concurred in by Devens and Knowlton, JJ., is worthy of notice, and will undoubtedly commend itself to many. He takes the position that the transfer was not an executory contract, but a prior delivery of the property to take effect as a full transfer at the very instant of the marriage; that the statute cited by the court does not apply to this case. Independently of the statute, the transfer to the wife would be valid unless she participated in her hus-

band's fraudulent intent. Even an unfulfilled promise to marry is held a valuable consideration — *a fortiori* — marriage itself. And the contract being executed, is not within the statute of frauds.

A CASE, interesting for its novelty, and instructive because of the ability and exhaustiveness of the opinions filed, is that of *Baker v. Stewart*, 19 Pac. Rep. 904, recently decided by the Supreme Court of Kansas. It was there held that a deed conveying real estate to a husband and wife, conveys the same to them in entirety, and that on the death of one, the survivor takes the entire estate, and it was further held that neither the statutes relating to married women, nor to descents and distributions have changed this rule of law. The reasoning of the court was about as follows: A deed might be executed to a husband and wife which would convey to them, as tenants in common, provided it appears in express words or words strictly implying in such an intention. But by the common law and the weight of authority, a deed to husband and wife conveys the estate in entirety with right of survivorship in either as to the whole of the property. The cases cited from Iowa, Illinois and New Hampshire, as holding a contrary view, were decided under special statutes, and, therefore, are not authority. That the married woman's act does not change this rule, because that act was passed presumably for the benefit of married women, and as, according to the statistics, the expectancy of life for women is greater than that for men, and if the married woman's act transforms an estate in entirety into an estate in common, then it will, in a great majority of cases, divest married women of one-half their estates. That the weight of authority is against such a construction of the married woman's act.

Chief Justice Horton, dissenting in an elaborate opinion, takes issue with the court as to the first premise, viz: that an estate in common could be, by the common law, conveyed to husband and wife, claiming that upon reasoning and the weight of authority husband and wife cannot, at common law, by any words of grant, be made either joint tenants or tenants in common. For that reason he opposes recognizing estates in entirety, inasmuch as that determines the incapacity

of husband and wife to take either as joint tenants or tenants in common.

In *Lindsey v. State*, 5 South. Rep. 99, recently decided by the Supreme Court of Mississippi, the defendant was indicted for carrying concealed weapons while Code, § 2985, was in force. He was tried after the passage of the act March 9, 1888, amending the code by striking out the clause which excepted from the prohibition persons apprehending an attack, and by increasing the penalty. Appellant urged that he cannot be punished under the old law because it had been repealed, nor under the amended law because, as to him, it is *ex post facto*, both under State and federal constitutions. The court in adopting that conclusion, say:

As to him, the amended law was clearly an *ex post facto* law—First, because it abrogated the right which before existed of defending against the charge on the ground that he had good and sufficient reason to apprehend an attack, and made an act criminal which was not so at the time the amendment was passed; and, second, because it changed, but did not mitigate, the punishment for the offense. *Calder v. Bull*, 3 Dall. 386; *Hartung v. People*, 22 N. Y. 95; *Kring v. Missouri*, 107 U. S. 221; *Com. v. McDonough*, 13 Allen, 581. * * * Such being the nature of *ex post facto* laws, it is nevertheless true that the punishment for offenses already committed may be changed by statute, provided the punishment is mitigated, and not increased or aggravated, by the change. As the constitutional provision was enacted for protection against arbitrary and oppressive litigation, it is quite evident that it is not violated by any change in the law which goes in mitigation of the punishment. There has been much diversity of opinion as to what would constitute mitigation of punishment in such case, but the view best sustained by reason and authority is that a law changing the punishment of offenses committed before its passage is objectionable as being *ex post facto*, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or administration as its primary object. *Cooley*, Const. Lim. 329. It is enough for courts to render judgment according to law, without being required to determine the relative severity of different punishments, when there is no common standard in the matter by which the mind can be satisfactorily guided.

The Supreme Court of California, in the case of *San Benito County v. Southern Pac. R. Co.*, 19 Pac. Rep. 827, gracefully acquiesces in the ruling of the United States Supreme Court, as expressed in *State v. Railroad Co.*, 8 S. C. Rep. 1073, and reversing a number of their former decisions, hold that an ordinance requiring the Southern Pacific R. Co. to take out a license, in order to continue its business of carrying freight or pas-

sengers for hire by means of railroad cars, is void, as a tax upon the use of a franchise granted by the United States. *Thornton, J.*, says:

The rulings of the Supreme court of the United States, in the cases cited in the beginning of the foregoing opinion, on the question of the power of the State to tax the franchises granted by the United States government must control our action in this case. The question is federal; and on such questions the settled law requires that the courts of the State shall conform to the decisions of the highest federal judicial tribunal. The license tax in question herein is one that affects the franchises enjoyed by the defendant company under a grant or grants from the federal government. It is a tax on the right of this company to carry on its business under the federal grant, and comes within the judgments of the United States Supreme Court in the cases cited. Under the constitution of this State, which requires all taxation to be equal and uniform throughout the State, it must be supposed that the legislature would not impose or authorize the imposition of any taxes by any county or other political subdivision of the State, whether in the nature of property or license taxes, which would destroy or render valueless the business of any railroad corporation, or cripple such corporations by onerous burdens. The guaranty of fair and just taxation is found in the constitution of the State. Taxation by a county must be equal and uniform, at least as to all persons engaged in the same business in the county; and such a guaranty will protect railroads in a county from unfair or unjust or oppressive taxation which would tend to destroy their business or cripple it, or interfere with their right to do business, as it protects individuals on whom such taxes are imposed. The amount of the tax is so small in the case before us that it cannot be considered onerous. But in the view taken by the supreme federal tribunal, the foregoing considerations are of no weight. The power of the State to tax is held not to exist at all, without regard to the fact whether the tax is so trifling as not to in any degree be onerous, or equal or uniform on all persons, whether natural or artificial, engaged in the business of carrying persons or freight for hire, or by means of railroad cars. Following then the judgments of the Supreme Court of the United States in the cases above cited, we must hold that the license tax under consideration was levied without authority of law, and must be held void.

The case of *Leahey v. Cass Ave., etc. R. Co.*, 10 S. W. Rep. 58, decided by the Supreme Court of Missouri, aptly illustrates what evidence is admissible as part of the *res gestæ*. This was an action for the death of a boy caused by injuries received by him under a horse-car, and it was held that his declarations, made at the scene of the accident and when first picked up, as to how he got under the car, are admissible in evidence; but that his declarations made after he had been removed and the persons connected with the accident had separated, and in answer to questions as to how he got in-

jured, are admissible, even though made only a short time after the accident. The court says:

Care must be taken not to make the field of *res gestæ* too large or too contracted. The better reasoning is that the declaration, to be a part of the *res gestæ*, need not be coincident in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause. The declaration is, then, a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible. Much, therefore, depends upon the nature and character of the transaction in question; for it may be, and often is, of a continuing character. It cannot be said that a mere subsequent declaration will of itself furnish a sufficient connecting circumstance. Applying these principles to the present case, it is clear that what the boy said as to how he got under the car, when first picked up, was properly received as evidence of the cause of his injuries. He was then at the scene of the accident, surrounded by persons who witnessed the calamity, and his declaration then made were verbal acts, though made after the accident had happened. But what he said after he had been removed to the house of Mr. Keating, after the persons connected with the accident had separated, and in answer to questions as to how he got hurt, should have been excluded. These answers were but narratives of what had transpired, made and intended as such. The time between the accident and making these declarations is short, it is true, but they are disconnected from the main fact. We do not understand any of the cases before cited to go far enough to admit these declarations unless it be that of *Harriman v. Stowe*, 57 Mo. 53.

THE case of *Byam v. Collins*, 19 N. E. Rep. 75, decided by the New York Court of Appeals, furnishes an interesting disquisition on the law pertaining to privileged communications in the law of libel and slander. It was there held that a libelous letter concerning the suitor of the person addressed, not written at the latter's request, but written to prevent a marriage, is not privileged by reason of previous friendship, nor by reason of a request made four years before, for information of anything concerning any young man the person addressed "went with." The court, after an exhaustive review of the authorities, says:

The general rule is that in the case of a libelous publication the law implies malice, and infers some damage. What are called "privileged communications" are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "A communication made *bonæ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a correspond-

ing interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." * * * Whether within the rule as defined in these cases a libelous communication is privileged, is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury. It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties—the one making and the one receiving the communication—are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith, and without malice. But a mere volunteer, having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation, but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

REMOVAL OF CAUSES FOR PREJUDICE OR LOCAL INFLUENCE.

In view of the conflicting decisions of the federal courts relating to the removal of causes, under the act of 1887, for prejudice or local influence, and the question not having been decided by the Supreme Court of the United States, it is proposed briefly to consider four questions relating to the procedure in such cases, viz: 1st. The amount involved in the suit. 2d. In what court the petition for removal is to be filed. 3d. What showing of prejudice or local influence is necessary; and 4th, the procedure to remand the cause.

The first section of the act of 1887, as corrected by the act of August 13, 1888, provides: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of

all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." In *Mallon v. R. & D. R. R. Co.*¹ Harlan, J., in construing the above section, says: "I think it is equally clear that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute exceeds \$2,000 exclusive of interest and costs. The clauses of the second section of the act of 1887, defining the different kinds of suits that may be removed, preserve the same element of the value of the matter in dispute as is found in the first section relating to the original jurisdiction of circuit courts. This is done by the provision giving the right of removal in suits of which the circuit courts of the United States are given original jurisdiction by the preceding (first) section. As by the first section the circuit court may take original cognizance, concurrent with the State courts, of all suits therein described, where the matter in dispute, exclusive of interest and costs, exceeds \$2000, the clauses in the second section, giving the right of removal in suits, of which the circuit courts of the United States are given original jurisdiction by the preceding section, necessarily restricts the right of removal to suits in which the value of the matter in dispute, exclusive of interest and costs, exceeds the above amount." Jackson, J., in *Whelan v. N. Y. etc., R.R. Co.*,² seems to have reached a different conclusion. There is but little doubt, however, of the soundness of Judge Harlan's reasoning, and that to au-

thorize a removal the amount involved must exceed \$2,000.

2d. The 12th section of the judiciary act of 1789 requires the party seeking to remove a cause to file a petition in the State court, and offer in said State court good and sufficient surety for his entry in such circuit court on the first day of its session, copies, etc. This procedure has been substantially observed in all the acts of congress. In *Hills v. R. & D. R. R. Co.*,³ the action was originally brought in the superior court of Fulton county, Georgia, the petition for the removal of the cause, under the local prejudice act of 1887, being filed in that court, and the cause removed.

On a motion being filed to remand the cause the motion was overruled. In *Fisk v. Henaire*,⁴ it was held that the provision of the statute authorizing the removal of a cause, on the ground of prejudice or local influence, did not change the procedure. It is said, page 232, "the plain purpose of the act, so far as the removal of causes on the ground of prejudice or local influence is concerned, is to provide who may remove a suit for such cause and within what time, and not to prescribe the procedure or manner of taking the removal." In *Short v. Chicago, Minneapolis, etc. R. R. Co.*,⁵ Judge Brewer held that the showing of local prejudice may be made by affidavit filed in the State court, and a certified copy thereof filed in the United States circuit court. So far as we are aware no case has been decided holding it improper to file the petition for removal in the State court, although in *Malone v. Richmond, etc. R. Co.*⁶ and *Whelan v. N. Y., etc. R. Co.*, *supra*, the petition for removal was filed in the United States circuit court; no particular objections seems to have been made on that ground, and the question as to the propriety of filing the petition there does not appear to have been raised. The circuit court of the United States, in causes properly removable to that court, has merely concurrent jurisdiction. This fact sometimes appears to be lost sight of. A State court, therefore, having jurisdiction of the subject-matter, and the parties may no doubt proceed with the case until

¹ 35 Fed. Rep. 626.

35 Fed. Rep. 849.

³ 33 Fed. Rep. 81.

⁴ 35 Fed. Rep. 230.

⁵ 35 Fed. Rep. 227.

⁶ 35 Fed. Rep. 625.

some matter is brought to its attention which will deprive it of jurisdiction. The ordinary mode is by petition which performs the office of a pleading. The petition, therefore, should state the essential facts not otherwise appearing in the record which the law has made a condition to the change of jurisdiction.⁷ The necessity for this statement of facts is very clearly set forth in *Grafton v. Nongues*,⁸ by Sawyer, J.: "I think it of the highest importance to the rights of honest litigants, and to the due and speedy administration of justice, that a petition for transfer should state the exact facts and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself from the facts whether the suit does really and substantially involve a dispute or controversy properly within its jurisdiction." The exceptions referred to in section three of the act of 1887, evidently refer to the time of filing the petition in the State court, and do not exempt a party who desires to remove a cause, on the ground of prejudice or local influence, from filing a petition in that court; that is, in ordinary cases the petition must be filed at any time before the defendant is required by the laws of the State or the rule of the State court to plead or answer, while in cases of prejudice or local influence the petition for removal may be filed at any time before the trial.

3d. The third subdivision of section 639 of the Revised Statutes of the United States provides, that when a suit is between a citizen of a State in which it is brought and a citizen of another State, it may be removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit; if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

The second section of the act of 1887 provides, "that where a suit is now pending or may be hereafter brought in any State court

in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, any defendant being such citizen of another State may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it should be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such State court, or in any other State court to which the defendant may under the laws of the State have the right, on account of such prejudice or local influence, to remove said cause, etc.; and when a cause has been removed on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof," etc.

It is apparent that the third subdivision of § 639 of the revised statutes was materially modified by the act of 1887. Some controversy has arisen as to the mode in which it shall be made to appear in said circuit court that, from prejudice or local influence, he (the defendant) will not be able to obtain justice in said State court, etc. In *Hills v. Rich. & D. R. Co.*,⁹ it was held that an affidavit of the defendant, stating in substance what was required under the third subdivision of § 639, and in addition "that he will not be able to obtain justice in any other State court to which the defendant under the laws of the State had the right under the laws of said State to remove said cause, was sufficient. Substantially the same ruling was made by Judge Deady in *Fisk v. Henarie*,¹⁰ and Judge Jackson in *Whelan v. N. Y., L. E. & W. R. Co.*¹¹ In *Short v. C., M. & St. P. Ry. Co.*,¹² Judge Brewer says, "all that is required is that it shall be made to appear to the circuit court that, from prejudice or local influence, the party will not be able to obtain justice in such State court, and this showing may be made by affidavit; and if this contains a specific averment, while it may not be conclusive, it is *prima facie*

⁷ *Gold Washing Co. v. Keyes*, 96 U. S. 139. It is not sufficient to present the petition and bond to the clerk, who is the court's mere ministerial officer. *Shedd v. Fuller*, 36 Fed. Rep. 609.

⁸ 4 Cent. L. J. 230.

⁹ 33 Fed. Rep. 81.

¹⁰ 35 Fed. Rep. 231.

¹¹ 35 Fed. Rep. 849.

¹² 34 Fed. Rep. 227.

evidence of the fact and throws the case into this court, leaving the other party to challenge its truth." In that case, the affidavit was made under the act of 1867, and the Judge said, "it is no affidavit at all."

In *Malone v. Rich. & D. R. Co.*,¹³ Mr. Justice Harlan says: "I think it competent for the circuit court to receive evidence upon the point by affidavits, or by depositions, or by means of an oral examination of witnesses in its presence." The want of uniformity in the decisions in this regard is a matter of regret, but in no case, so far as the writer is aware, has it been held that an affidavit of a defendant, stating in positive terms "that, from prejudice or local influence, he will not be able to obtain justice in such State court, or in any other State court to which the defendant under the laws of the State may have the right, on account of such prejudice or local influence, to remove said cause," when filed in the State court with the petition for removal, and a certified copy thereof filed in the United States circuit court was insufficient on the face of the papers to authorize a removal of the cause. This, therefore, would seem to be the proper procedure.

4th. The mode in which prejudice and local influence shall be made to appear to the circuit court is not prescribed in the act. In *Short v. C., M. & St. P. Ry. Co.*,¹⁴ Judge Brewer, after stating that a cause may be removed upon the filing of an affidavit in the State court, "alleging in plain and unequivocal terms that such local prejudice does exist, and that a fair trial cannot be had," says: "After the affidavit has been presented and a removal ordered, the party opposing it may come in and traverse the allegation of prejudice the same as any other averment of fact, and this need not be done by a plea of abatement."¹⁵

The ordinary mode challenging the truth of the grounds upon which a cause has been removed is by a plea in abatement, and there

would seem to be no good reason why this procedure should not be followed where the removal was had on the ground of prejudice or local influence. The fact that no procedure is provided in the act tends to show that congress intended the former procedure to continue in force. There is another fact which seems to have escaped attention, and that is that the act of 1887 is not one enlarging the powers of the United States circuit courts. In other words, it is not a remedial act conferring new authority upon such courts, but was intended to restrict and limit the jurisdiction. Thus, the matter in controversy must exceed \$2,000 in value, and the right of removal is restricted to defendants being non-residents of the State, etc., while the act of 1867 is so far modified that the right of removal for prejudice or local influence depends not on the belief of the party making the oath, but on the actual facts that such prejudice or local influence does exist in such a degree as to prevent a fair trial. This question involves the construction of the statutes of the State, granting a change of venue. Suppose the State statute authorizes a change of venue in any case where it is made to appear that a fair and impartial trial cannot be had in the county where the action is pending, and the court is authorized to change the place of trial to some adjoining county where the objections do not exist, or if the objections apply to all the counties of that judicial district, then to some county in an adjoining district where the objections do not apply. To warrant a change of venue, it is not sufficient to show that one of the parties has a number of enemies in that county who are prejudiced against him, if there is no general bias or prejudice against him, so as to affect a jury. In other words, if a fair and impartial jury can be impaneled, and a fair trial had in the county where the action is pending, the place of trial will not be changed.¹⁶ To warrant the United States circuit court in retaining a cause against the objection of the adverse party, therefore, it must be made to

¹³ 35 Fed. Rep. 628-9.

¹⁴ 34 Fed. Rep. 228.

¹⁵ In *County Court v. B. & O. R. Co.*, 35 Fed. Rep. 166, it was held that a plea in writing "that it is not true that the Baltimore & Ohio Company has reason to believe, and does believe, that from prejudice and local influence it will not be able to obtain justice in the circuit court of Taylor county, or in any other State court," was insufficient, as it merely denied the existence of a belief, and not the fact of prejudice or local influence.

¹⁶ In *Southworth v. Reid*, 36 Fed. Rep. 454, Bunn, J., in remanding a case said: "I apprehend that in this State (Wisconsin) it would rarely happen that a proper case for removal would be made under this law." He also said that where "no case for removal has been shown to exist, the court cannot take jurisdiction by consent of the parties."

appear that in no State court to which a cause may be removed by a change of venue can a fair and impartial trial be had. The right of the circuit court to proceed in the case is dependant on this fact, and the investigation thereof should be full and exhaustive. As a general rule, there is but little interest taken in a civil action outside of the immediate parties to the suit, and the case will be rare indeed in which either prejudice or local influence will prevent a fair court and impartial jury from rendering to a litigant, that which is justly his due. But few cases can properly be removed under the prejudice or local influence clause of the act of 1887.

SAMUEL MAXWELL.

REMOVAL OF CAUSES ACT.

Enacted August 13, 1888.

CHAP. 866.—An act to correct the enrollment of an act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, and three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March third, eighteen hundred and seventy-five."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, approved March third, eighteen hundred and seventy-five," be, and the same is hereby, amended so as to read as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of an act entitled 'An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes,' approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of in-

terest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."

That the second section of said act be, and the same is hereby, amended so as to read as follows:

"SEC. 2. That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so

far as relates to such other defendants, to the State court, to be proceeded with therein.

"At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

"Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

That section three of said act be, and the same is hereby, amended so as to read as follows:

"SEC. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or

more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

SEC. 2. That whenever any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

SEC. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of congress of which this act is an amendment, or in the act of congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

SEC. 6. That the last paragraph of section five of the act of congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in his act.

SEC. 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

Approved, August 13, 1888.

COPY-RIGHT—STATE REPORTS—PREREQUISITES—VIOLATION—DAMAGES.

CALLAGHAN V. MYERS.

United States Supreme Court, December 17, 1888.

Copy-right—Law Reports.—The reporter of a volume of law reports, although he be a public officer, appointed by the authority of the government which creates the court of which he is the reporter, can obtain a copy-right for it as an author, in the absence of a prohibitory statute, and such copy-right will cover the parts of the work of which he is the author, namely, the head-notes, and the statement of facts and the arguments of counsel, although he has no exclusive right in the judicial opinions published. The question of salary of the reporter is immaterial.

Bill in equity, to perpetually enjoin defendants from publishing or selling certain Illinois Reports, upon which complainant claims a copy-right, also for a decree that all so published by defendants be forfeited to plaintiff, and that they be delivered to him, and for an account of all published and sold, and for a decree for damages. The circuit court rendered a decree in favor of plaintiff from which defendants appealed.

Opinion¹ by Mr. Justice BLATCHFORD:

The volumes of law reports of which the plaintiff claims a copy-right are in the usual form of such works. Each volume consists of a title page, of a statement of the entry of copy-right, of a list of the judges composing the court, of a table of the cases reported in the volume, in alphabetical order, of a head-note or syllabus to each opinion, with the names of the respective counsel, and their arguments in some cases, and a statement of facts, sometimes embodied in the opinion and sometimes preceding it, and of an index, arranged alphabetically, and consisting substantially of a reproduction of the head-notes. Of this matter, all but the opinion of the court and what is contained in those opinions is the work of the reporter, and the result of intellectual labor on his part.

The broad proposition is contended for by the defendants that these law reports are public property, and are not susceptible of private ownership, and cannot be the subject of copy-right under the

¹ The entire opinion in this case is very long. Much of it is taken up with interesting questions bearing on procedure in obtaining copy-right. We have eliminated all except that which pertains to the main question at issue, viz: the right of a State reporter to obtain a copy-right.—[ED. CENT. L. J.]

legislation of congress. It is urged that Mr. Freeman, the reporter, was a public officer, whose office was created by chapter 29 of the Revised Statutes of Illinois of 1845, which enacted as follows, in regard to the supreme court and the reporter.

"Sec. 20. The court shall appoint some person learned in the law to minute down and make report of all the principal matters, drawn out at length, with the opinion of the court, in all such cases as may be tried before the said court; and the said reporter shall have a right to use the original written opinion after it shall have been recorded by the clerk.

"Sec. 21. The reporter, before entering upon his duties, shall be sworn by some one of the justices of the supreme court faithfully to perform the duties of his said office. He may, for misconduct in office, neglect of duty, incompetency, or other cause shown, to be entered of record, be removed from office.

"Sec. 22. It shall be the duty of the reporter to deliver to the secretary of State, as soon as convenient after publication, such number of copies of the respective volumes of the reports of said court as may be necessary to enable the said secretary to distribute the same in the manner provided in the following section, together with one hundred copies in addition, to be deposited in the secretary's office for the use of the State." Section 23 provided for the distribution of the volumes by the secretary of State, and section 24 provided that, upon the delivery of the requisite number of any volume, the secretary of State should deliver to the reporter a certificate specifying the number of copies which had been so delivered, and that such certificate should entitle the reporter to a warrant drawn by the auditor of public accounts upon the treasury for an amount, for those volumes, at the price for which the books should be sold to individuals, provided, the price should not exceed the ordinary price of law books of the same description, to be determined by the auditor, treasurer, and secretary of State. These statutory provisions were amended in 1863, by making the term of office of the reporter six years, and in 1865 it was enacted that the price of the volumes to be delivered to the secretary of State should be \$6 each. The reporter was given a salary, by law, in 1877, of \$6,000 a year.

It is further contended that Mr. Freeman, in preparing the official edition of the reports, was not an author, within the meaning of the act of congress, and that it was not intended by that act that he should assert a monopoly in the result of his official labors.

But, although there can be no copy-right in the opinions of the judges, or in the work done by them in their official capacity as judges (*Banks v. Manchester, ante, 36*), yet there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copy-right

for the volume which will cover the matter which is the result of his intellectual labor. In the present case there was no legislation of the State of Illinois which forbade the obtaining of such a copy-right by Mr. Freeman, or which directed that the proprietary right which would exist in him should pass to the State of Illinois, or that the copy-right should be taken out for or in the name of the State, as the assignee of such proprietary right. Even though a reporter may be a sworn public officer, appointed by the authority of the government which creates the court of which he is made the reporter, and even though he may be paid a fixed salary for his labors, yet, in the absence of any inhibition forbidding him to take a copy-right for that which is the lawful subject of copy-right in him, or reserving a copy-right to the government as the assignee of his work, he is not deprived of the privilege of taking out a copy-right which would otherwise exist. There is, in such case, a tacit assent by the government to his exercising such privilege. The universal practical construction has been that such right exists unless it is affirmatively forbidden or taken away, and the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary, under the governments both of States and of the United States.

This question was, it is true, not directly adjudged in *Wheaton v. Peters*, 8 Pet. 591. In that case the owners of the copy-rights of Wheaton's Reports of the Supreme Court of the United States brought a suit in equity against Mr. Peters for publishing and selling a volume of his Condensed Reports of the Supreme Court. The bill was dismissed by the circuit court. On an appeal by the plaintiffs to this court one of the points urged by the defendants was that reports of the decisions of this court, published by a reporter appointed under the authority of an act of congress, were not within the provisions of the law for the protection of copy-rights. This court held (1) that the plaintiffs could assert no common law right to the exclusive privilege of publishing, but must sustain such right, if at all, under the legislation of congress; (2) that, under such legislation, there must have been, in order to secure the copy-right, a compliance with the provisions of the statute in regard to the publication in a newspaper of a copy of the record of the title of the book, and in regard to the delivery of the copy of it, after publication, to the secretary of State. The court remanded the case to the circuit court for a trial by a jury as to whether there had been a compliance with the above named requisites of the act of congress. In a note by Mr. Peters, at page 618 of the report of the case, he states that he has been informed that the court did not consider the point whether reports of the decisions of the court, published by a reporter appointed under the authority of an act of congress, were within the provisions of the law for the protection of copy-rights. When the suit was brought, Mr.

Wheaton had published the twelve volumes of his copy-righted reports. The allegation of the bill was that the volume complained of, published by Mr. Peters, contained all the reports of cases found in the first volume of Wheaton's Reports. It appears from the report of the case, and the record in it, that Mr. Wheaton had published his first volume in 1816, and his twelfth volume in 1827. From March 3, 1817, for three years, the reporter had a salary of \$1,000 a year, and the same salary from May 15, 1820, to March 3, 1826, and for three years from February 22, 1827. The decree of this court, providing for a trial by a jury (page 698), covered the entire twelve volumes of Wheaton's Reports.

If this court had been of opinion that there could not have been a lawful copy-right in the volumes of Wheaton's Reports, it would have been useless to send the case back to the circuit court for an inquiry whether the conditions precedent to the obtaining of a lawful copy-right, under the act of congress, had been complied with, especially in view of the fact that the opinion of the court concludes (page 668) with this statement: "It may be proper to remark that the court are unanimously of opinion that no reporter has or can have any copy-right in the written opinions delivered by this court, and that the judges thereof cannot confer on any reporter any such right." Therefore, the only matter in Wheaton's Reports which could have been the subject of the copy-rights in regard to which the jury trial was directed was the matter not embracing the written opinions of the court, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index. Such work of the reporter, which may be the lawful subject of copy-right, comprehends also the order of arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions (where such table is made), and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references, where such exist. A publication of the mere opinions of the court, in a volume, without more, would be comparatively valueless to anyone. The case of *Wheaton v. Peters* was decided at January term, 1834. In *Gray v. Russell*, 1 Story, 11, in 1839, Mr. Justice Story, in speaking of the question as to how far a person was at liberty to extract the substance of copy-righted law reports, says (page 20:) "In the case of *Wheaton v. Peters*, 8 Pet. 591, the same subject was considered very much at large. It was not doubted by the court that Mr. Peters' Condensed Reports would have been an infringement of Mr. Wheaton's copy-right, supposing that copy-right properly secured under the act, if the opinions of the court had been or could be the proper subject of the private copy-right by Mr. Wheaton. But it was held that the opinions of the court, being published under the authority of congress, were not

the proper subject of private copy-right. But it was as little doubted by the court that Mr. Wheaton had a copy-right in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause went back to the circuit court for the purpose of further inquiries as to the fact whether the requisites of the act of congress had been complied with or not by Mr. Wheaton. This would have been wholly useless and nugatory unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copy-right (for that was the work which could be the subject of a copy-right); so that, if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress." This seems to us to be a proper view of the decision in *Wheaton v. Peters*, and that decision is as applicable where a reporter receives a compensation or salary from the government as where he does not, in the absence of any restriction against his obtaining a copy-right.

In the present case, although Mr. Freeman, during the period of his preparation of volumes 32 to 46, received no direct salary from the State, it is contended by the defendants that he received from the State compensation for his services, through the purchase by it, under a statute, of copies of his volume at a stated price of \$6 per copy for 553 copies of each volume, and that this was substantially the payment of a salary to him by the State. But, as stated before, in the view we take of the case, the question of a salary or no salary has no bearing upon the subject. The general proposition that the reporter of a volume of law reports can obtain a copy-right for it as an author, and that such copy-right will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published, is supported by authority. *Curt. Copyr.* 131, 132; *Butterworth v. Robinson*, 5 Ves. 709; *Cary v. Longman*, 1 East, 358, and note, 362; *Mawman v. Tegg*, 2 Russ. 385, 398, 399; *Hodges v. Welsh*, 2 Ir. Eq. 266, 287; *Lewis v. Fullarton*, 2 Beav. 6; *Saunders v. Smith*, 3 Mylne & C. 711; *Sweet v. Benning*, 16 C. B. 491; *Jarrolld v. Houlston*, 3 Kay & J. 708, 719, 720.

NOTE.—The principal case is the first and only direct adjudication by the Supreme Court of the United States, sustaining the right of a law reporter to a copy-right of a volume of law reports. Although such right was clearly intimated in *Wheaton v. Peters*,¹ yet the court in the principal case expressly states that that question was "not directly adjudged in *Wheaton v. Peters*."

The right of the reporter to secure his copy-right, springing wholly from the constitution and laws of congress, is based on the ground that his work in preparing the *syllabi*, statements of the cases, index, etc., is "the result of intellectual labor on his part," and that he can obtain a copy-right "for the volume which will cover the matter which is the result of his intellectual labor," although he is a sworn public officer, receiving a fixed salary for his labors! While the

English decisions recognize the right of a reporter of law reports to protection by copy-right,² yet, as was stated by the learned counsel for appellants, "in all these cases the reporter was a private citizen, occupying no official relation, and owing no duty to the public," and therefore they are "not in point upon the question under consideration."³

That there can be no such proprietary interest in the reporter or judges of the opinions of the court as will entitle them to a copy-right thereof is well settled.⁴

The reasons are aptly stated in *Drone on Copy-rights*, p. 161, as follows: "It is obvious that the copy-right in an opinion written or delivered by a judge cannot be acquired by a reporter or the first publisher on the ground of authorship, for the reason that he is not the author. It is not less clear that the judge who pronounces the decision is not entitled to the copy-right therein, because he is not the owner of the property. Hence, neither in the judge nor in the reporter will a valid copy-right vest, except by a derivative title. The copy-right must be secured by the owner of the property; and all difficulty disappears when it is determined who is the owner. Elsewhere it is shown that any person who employs another to prepare a work, may, by virtue of the contract of employment, become the owner of the literary property therein. On this principle, the people who employ and pay judges are the rightful owners of the literary property in the opinions written by them. Hence, the United States government may secure to itself the copy-right in the decisions pronounced in the federal courts, and each State may do the same with the opinions of its own judges. And the government may confer upon any person the right of securing, or the copy-right after it has been secured."

The doctrine is also clearly stated in 2 *Morgan's Law of Literature*, p. 569: "An examination of all the reported cases warrants us in the conclusion that the reason why a judge can have no literary property in opinions pronounced by himself, upon legal questions presented or discussed before him, is simply and solely because he is but the mouth-piece of the State, paid by the people of the State, to utter and construe their law. We have seen that the courts are the distributors of the justice of the people, and that, by the theory of the law, the State hears all disputes of its citizens."

In the recent case of *Banks v. Manchester*,⁵ it is held that (1) a copyright, obtained by a reporter on a volume of the reports published by a contractor in accordance with the Ohio statute, which, in effect, provides that a reporter of the supreme court shall be appointed, to report and prepare for publication its decision, and to receive therefor a certain compensation, and to secure a copy-right for the use of the State for each volume when published, and also for the publication of the reports under a contract with the Secretary of State of the State, and that "such contractor shall have the exclusive right to publish such reports, so far as the State can confer the same," does not cover the *syllabi*, statements of the cases, and opinions, which were the

² *Carter*, p. 80; *Bacon's Abridg.*, title *Prerogatives*, F 5; *Skinner*, 234; *Millar v. Taylor*, 4 Burr. 3304, 2383; *Beckett v. University of Cambridge*, 1 W. Black. 105; *Manners v. Blair*, 3 Bligh (N. S.), 391. See also authorities cited in opinion.

³ See *Heine v. Appleton*, 4 Blatchf. 125.

⁴ *Wheaton v. Peters*, 8 Pet. 591; *Gray v. Russell*, 1 Story, 11.

⁵ *Affirming* s. c., 23 Fed. Rep. 143; 9 S. C. Rep. 36.

¹ 8 Pet. 591.

work of the judges; and (2) a State cannot properly be called a citizen, within the meaning of Rev. Stat. U. S. §§ 4952, 4954, which confers the copyright on any citizen, "who shall be the author, inventor, designer, or proprietor of any book," and upon his representatives or assigns; and (3) so a copy-right is denied a judge who, in his official capacity prepares the *syllabi*, statements of the cases and opinions under § 4952, for the reason that he cannot be considered an author or proprietor within the provisions of those sections, so as to confer any title by assignment on the State or other person, sufficient to authorize a copy-right to it or him as the assignee of the author or proprietor.

Respecting the latter point, the court observed (per Blatchford, J.): "Judges, as it is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labor. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and head-notes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a *judicial consensus*, from the time of the decision in the case of *Wheaton v. Peters*,⁶ that no copy-right could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duty. The work done by the judges constitute the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute."⁷

This quotation clearly shows the ground upon which judges are denied a copy-right, to-wit: Because they are public officers, laboring for the State, and receiving "from the public treasury a stated annual salary;" hence, the fruits of their labor, "extending to whatever work they perform in their capacity as judges, as well to the statement of cases and head-notes prepared by them as such, as to the opinions and decisions themselves," belong to the public.

If it is conceded that this view is sound, and it is believed that it is unquestionably so, there appears to be no good reason why it should not with equal propriety be applied to a reporter who holds his office by virtue of the same authority—is a public officer, laboring for the State, and "receives from the public treasury a stated annual salary, fixed by law." Why should he have a "pecuniary interest or proprietorship, as against the public at large," in the fruits of his labors as a public court reporter, when it is held that no such right belongs to the judge who prepares the opinion for him to report? Why should that "*judicial consensus*," which has existed from the time of the decision of *Peters v. Wheaton*, "that no copy-right could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties," be limited to "judicial officers?" It is because their work is public property, constituting the "authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all," and the work of the reporter in rendering their judicial labors available to the public, in the *discharge* of his official duty, by preparing the title page, table of cases, head-notes, statements of facts, arguments of counsel

and index (for, as said by the court in the principal case, "a publication of the mere opinions of the court in a volume, without more, would be comparatively valueless to any one)," is private labor, in which he possesses a "pecuniary interest or proprietorship?" Can any good reason be conceived why that "*judicial consensus*" should not also include the labors of a public officer discharging the duties of a reporter, as well as the labors of a judicial officer? The reason of the discrimination in favor of the reporter does not seem clear. Though one possessed "the metaphysics of Hudibras, though he were able

"to sever and divide
A hair 'twixt north and northwest side."

yet he could not insert his metaphysical scissors" between the public office and duties of a court reporter and those of the judges, respecting the question under consideration.

Mr. Morgan, in his *Law of Literature*, vol. 2, p. 569, after stating the reasons which deny the judges proprietary interest in judicial opinions, says: "But, if the reason is a good one, it would seem to apply equally to a reporter, who also receives a salary from the people, to catch the opinions as they fall from the lips of the judges appointed by the people, and to arrange and publish them for the use of the people, and that there would, therefore, be no copy-right in the labors of an official reporter, appointed by the court or elected by the people, provided his salary or the compensation for his services be paid from the public treasury. In *Little v. Hall*,⁸ it was held that, under the statute of the State of New York, by virtue of which Judge Comstock was appointed reporter of the decisions of the court of appeals, no copy-right could be had in the reports."

Mr. High, in his able argument in the principal case, challenged the existence of any literary property in law reports, and denied that they are or can be the subject of copy-right under the act of congress, for the power of congress to legislate, under the constitution, is limited to authors, and it does not extend to officers of the government engaged in public or official duties. He argued that the test is, whether a writer is engaged in a private business, and, therefore, an author, within the meaning of the constitution, or whether he is engaged in a public service, which forever dedicates the result of his labors to the public, whom he serves. Unquestionably this is the true criterion.

The decision of *Banks v. Manchester*, *supra*, respecting judicial opinions, clearly rests upon this distinction, and, therefore irreconcilable with the principal case. EUGENE MCQUILLIN.

⁸ 18 How. 165.

QUERIES AND ANSWERS.*

QUERY NO. 5.

A appeals from judgment of justice court, and by erroneous advice of his attorney he fails to pay docket fee in appellate court within twenty days' limit, as provided by statute. Case was dismissed by motion of B, appellee, and motion of A's to permit payment of fee and have case docketed overruled by appellate court. Has A no remedy? Cite authority, if any.

C. M. R.

⁶ 8 Pet. 501.

⁷ *Nash v. Lathrop*, 142 Mass. 29, 33.

QUERY No. 6.

A makes a contract in writing with B to buy land. Under said agreement A goes in possession and pays purchase money, except \$100. A being unable to meet the last payment, goes to C, in whom he reposes confidence. C agrees to lend the money, on being secured by mortgage, the land to be sold on thirty days' notice to A if the same is not paid at maturity, to which A assents. A being ignorant and unlettered, accompanies C to B, and on payment B makes C a deed. This was in 1872. A continues in possession under the belief that his agreement had been carried out, until September, 1873 (before the expiration of the time of payment), when he flees the State. A paid C about \$60, at different times, as a credit on amount due, and before left he requested C to attend to his land. A, unable to return, wrote to C several letters but received no reply, but was informed by others that his land was vacant and unclosed. In 1880 he wrote his brother to attend to the same, who agreed to do so, but did not take possession. A, under the belief that the land is his, returned in December, 1888, and finding the land vacant, takes possession; C turns up and claims the land; A institutes suit, discovering for the first time that C had a deed. As a matter of fact, soon after A's departure C sold the land to D, who paid a large part of purchase money, but reconveyed the same to C for balance due. D was in possession two years. The possession of D was the only actual possession. What rights have A, and does the statute of limitations apply? Give authorities.

J. M. M.

QUERIES ANSWERED.

QUERY No. 1.

[To be found in Vol. 28, Cent. L. J., p. 51.]

A power of sale in a mortgage is a power coupled with an interest: *Varnum v. Meserve*, 8 Allen, 158; *Hunt v. Rousmanier*, 8 Wheat. 175. C was by the assignment placed in B's shoes, and could sell the property under the power of sale contained in the mortgage: 1 *Hilliard on Mortgages*, 531; *Allen v. Chatfield*, 8 Minn. 435; *Montague v. Dawes*, 12 Allen, 397; *Speer v. Haddock*, 31 Ill. 439. As to whether the second heir can claim the benefit of the suit from its institution, is a proposition upon which the decisions are conflicting: *Angell on Lim.* (6th ed.) § 317, and note.

W. R.

QUERY No. 3.

[To be found in Vol. 28, Cent. L. J., p. 51.]

If the first judgment was merged in the second, the lien of the first judgment ceased. *Freeman on Judg.*, § 388. The decisions are conflicting upon the question of merger. *Idem*, § 216, and note. The lien being only in favor of the first judgment, it, in any case, has run out by the lapse of two years without its enforcement by an execution under such judgment. C has the title so far as the question of lien is concerned.

J. J. F.

QUERY No. 4.

[To be found in Vol. 28, Cent. L. J., p. 92.]

In this case the parties concerned are usurping corporate franchises after their right thereto has expired. We find no Minnesota decision on the subject. We think the proper process is for the attorney-general of the State to proceed against them for unlawfully exercising corporate franchises, and after judgment of ouster to have a receiver appointed to dispose of the assets, under chap. 50, Gen. Stat. Minn. 1881, pp. 831-2-3.

L. R.

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ABATEMENT AND REVIVAL—Foreign Administrator.

— An action against a resident of another State should not be revived, on his death, against his administrator appointed in that State, administration not having been granted in this State. — *Lyons v. Parr*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 863.

2. ABATEMENT AND REVIVAL—Special Administrator.

— On the death of the plaintiff in an action to restrain a sale of land for taxes, a special administrator cannot continue the suit, and the heirs are the parties in interest in such case. — *Driscoll v. Hays*, S. C. Ark., Nov. 17, 1888; 9 S. W. Rep. 853.

3. ACTION—Promise.—Findings that defendant employed plaintiff to do certain tunneling at a specified price per foot; that it inadvertently let the same work to L on the same terms, and, on discovery of the mistake, "arranged with plaintiff and L to do the work together, which they did;" that defendant, on the termination of plaintiff's contract, measured the work done, and promised to pay plaintiff his share, an amount stated—show a separate cause of action for the amount found due plaintiff. — *Sullivan v. Grass Valley, etc. Co.*, S. C. Cal., Dec. 6, 1888; 19 Pac. Rep. 737.

4. ADMINISTRATOR—Waste.—Administrator *de bonis non* cannot call the administrator in chief to account for waste or conversion. — *Brice v. Taylor*, S. C. Ark., Nov. 10, 1888; 9 S. W. Rep. 854.

5. AGRICULTURAL LANDS.—Lands adapted to the growth of fruits are agricultural lands within the statute Pol. Code Cal. § 3495. — *Reeves v. Hyde*, S. C. Cal., Nov. 27, 1888; 19 Pac. Rep. 685.

6. ALIENS—Constructive Trust—Lien.—While aliens cannot, in Texas, claim a resulting or constructive trust in lands purchased by a citizen partly with funds paid him by the aliens through mistake, yet they are entitled to a lien on the land for the amount so furnished. — *Zundell v. Gess*, S. C. Tex., Dec. 4, 1888; 9 S. W. Rep. 579.

7. APPEALS—Justice of the Peace— Jurisdiction. — Gen. St. Colo. § 3222, provides that appeals from any decision of a justice of the peace in the city or incorporated town where a superior court is held, or from the decision of any police magistrate of said city or town, in any case involving the violation of a city ordinance, may be allowed to the superior court of such city or town: *Held*, that the superior court has jurisdiction of appeals from justices in cases not involving the violation of an ordinance.—*Cochran v. Cowan*, S. C. Colo., Nov. 30, 1888; 19 Pac. Rep. 764.

8. APPEAL—Guardian— Discretion of Court. — The power vested in the probate court to appoint a guardian of the estate of a minor is largely a discretionary one, and no appeal lies from the exercise of such power. — *Adams v. Specht*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 812.

9. APPEAL—Dismissal— Attorney. — a plaintiff, residing at a great distance from the capital of the State, employed certain attorneys at the latter place to attend to his case, pending in the supreme court, which they neglected to do, and the case was dismissed for want of prosecution: *Held*, that the plaintiff was entitled to have the case reinstated. — *State v. Gaslin*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 601.

10. APPEAL— Error — Exception. — Error assigned upon instructions given to a jury, upon a trial before the district court, cannot be considered by the supreme court, unless the proper exception was taken at the time the instructions were given.—*Schroeder v. Rinehard*, S. C. Neb. Nov. 28, 1888; 40 N. W. Rep. 593.

11. APPEAL — Transcript — Justice of the Peace. — Where an appeal is taken from the judgment of a justice of the peace of the district court, the appellant or his agent must deliver a transcript of the proceedings to the clerk of the court to which the appeal may be taken, within 30 days next following the rendition of the judgment.—*Converse Cattle Co. v. Campbell*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 594.

12. APPEAL—Record—Jurisdiction.—Where a cause is tried before a justice of the peace, and on an appeal in the district court, and the want of jurisdiction does not appear on the face of the papers, the objection will not be considered in the supreme court. — *McClure v. Campbell*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 595.

13. APPEAL—Review—Presumptions. — In a suit to enjoin the obstruction of a right of way and for damages, the latter question was submitted to a jury, and a verdict rendered for plaintiff. The judgment thereon was set up in an amended petition, and defendant was enjoined: *Held*, that it would be presumed that the injunction was properly granted.—*Hunt v. Kemper*, Ky. Ct. App., Nov. 24, 1888; 9 S. W. Rep. 803.

14. APPEARANCE—Plea to the Jurisdiction — Effect. — Under Civil Code Ky. § 118, the filing a pleading to the jurisdiction, on the ground of want of proper service, such defect not being patent in the return of summons, is not a general appearance, such as will waive service.—*Chesapeake, etc. Co. v. Heath's Admr.*, Ky. Ct. App., Dec. 8, 1888; 9 S. W. Rep. 832.

15. APPEAL — Judgment. — The court entered judgment against an executor for a debt in favor of B. Later the court entered another judgment, awarding execution in favor of all persons who had previously obtained judgments, including B's judgment: *Held*, the time for appealing began to run from the date of the later judgment. — *Boyd's Deceives v. Boyd's Ex'rs.*, Ky. Ct. App., Feb. 2, 1888; 9 S. W. Rep. 842.

16. APPEAL—Record— Abstract. — Under the rules of the Iowa supreme court, an abstract which is a mere copy of the transcript in respect to the pleadings and written evidence, and which sets out in full promissory notes, deeds, mortgages, etc., will be stricken from the files. — *Leskell v. Norman*, S. C. Iowa, Dec. 20, 1888; 40 N. W. Rep. 726.

17. APPEAL—Certificate of Judge. — Construction of Code Iowa, § 3175, providing for certificate of trial judge, in case of appeal where amount is less than \$100. —

Beeler v. Garrett, S. C. Iowa, Dec. 20, 1888; 40 S. W. Rep. 724.

18. ARBITRATION AND AWARD. — The award of an arbitrator cannot be set aside for errors of judgments as to the law or facts, if in making it he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct. — *Mauzy v. Whiton*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 638.

19. ARBITRATION AND AWARD — Revocation — Statute. — Under Code Civil Proc. N. Y. § 2383, providing that a submission to arbitration cannot be revoked after final submission, such a submission is revocable at any time before finally submitting the cause for decision, although the parties have expressly agreed not to revoke. — *People v. ex rel. v. Nash*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 630.

20. ARBITRATION AND AWARD.—Although an agreement to arbitrate provides that the decision of two of the three arbitrators shall be binding, yet all three must be present at every stage of the hearing, or the award of two will not be binding. — *Kent v. French*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 713.

21. ASSIGNMENT — Attachment. — An attachment creditor, who presents his claim to his debtor's assignee for settlement, waives all objections to the regularity of the assignment, no actual fraud being charged. — *Littlejohn v. Turner*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 621.

22. ASSIGNMENT—Frand. — Assignment for benefit of creditors will not be set aside for fraud of assignor unless the assignee or creditors knew of the fraud. — *Hill v. Shugley*, S. C. Ark., Nov. 3, 1888; 9 S. W. Rep. 845.

23. ATTACHMENT — Non-residence — Evidence. — Evidence upon which court justified in dissolving and dismissing attachment on ground of non-residence. — *Garlinghouse v. Mulvane*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 798.

24. ATTACHMENT—Instruction.—Where question on attachment is one of good faith in a purchase intervenor, an instruction which does not actually place burden of proof on the purchaser to prove such good faith is not erroneous.—*Martin v. Davis*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 712.

25. ATTACHMENT—Intervenor. — Question of facts and evidence under Code Iowa, 3016 Iowa, as to rights of intervenor for money owing on attachment. — *Horie v. Sutter*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 723.

26. ATTORNEY AND CLIENT—Compensation.—Question of fact as to how much of attorney's services were covered by a contingent fee. — *Gough v. Root*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 647.

27. BASTARDY—Evidence—Corroboration. — Under Pub. St. Mass. ch. 85, §§ 1, 16, providing that, on the trial of a complaint in bastardy proceedings, the fact that the woman in her travail accused the defendant of being the father of the bastard may be shown in corroboration of her evidence. — *Leonard v. Botton*, S. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 679.

28. BLACKMAIL—Evidence.—As to what constitutes blackmail under Code Iowa, § 3871.— *State v. Pierce*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 715.

29. CARRIERS—Passengers—Injury — Negligence.—A railroad company, in permitting the accumulation of snow and ice in moderate quantities on the platforms of its cars during a night run in a storm of snow and sleet, is not guilty of such negligence as would warrant a recovery for injuries in consequence thereof, particularly by one cognizant of the condition of the platforms.—*Palmer v. Penna. Co.*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 659.

30. CARRIERS—Passengers — Round-trip Ticket. — Liability of railroad company for damages in ejecting passengers holding round-trip ticket though detached. — *Wightman v. C. & M. Ry. Co.*, S. C. Wis. Dec. 4, 1888; 40 N. W. Rep. 699.

31. **CERTIORARI**—Review—Judgment. — In order to review a judgment rendered in the court for trial of small causes, which has been docketed in the court of common pleas, upon the ground of illegality in the proceedings of the trial court anterior to the judgment, the writ of *certiorari*, when allowable, should be directed to the court for the trial of small causes, not to the court of common pleas. — *State v. Davis*, S. C. N. J., Nov. 12, 1888; 16 Atl. Rep. 156.

32. **CHAMPERTY AND MAINTENANCE** — Contingent Fee—Attorney. — A contract to prosecute a claim before the court of commissioners of Alabama claims for a contingent fee is not illegal on the ground of champerty. — *Manning v. Sprague*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 673.

33. **CHATEL MORTGAGES**—Filing—Notice. — A chattel mortgage, duly filed in the county where the mortgagor resides, is constructive notice of the existence of such mortgage, and will be constructive notice in any county to which the mortgagor may remove the property. — *Grand Island Banking Co. v. Frey*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 599.

34. **CHATEL MORTGAGE** — Crop to be Grown. — A chattel mortgage of a crop to be grown in the future, and which has not been planted at the date of its execution, although made by one in possession of land, is void as against subsequent purchasers, or attaching creditors. — *Long v. Hines*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 706.

35. **CONSTITUTIONAL LAW** — Classification — Municipal Corporation. — Under classification act of 1882, population may be made the basis of classification in statutes relating to municipal bodies and their police powers, but such a classification cannot be made the means of evading the constitutional interdict of local or special laws where the classification is plainly illusory. — *State v. Hoogland*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 166.

36. **CONSTITUTIONAL LAW** — Municipal Corporations — Street Assessment. — Act Ky. March 24, 1882, § 1, providing for reconstruction of streets and assessment of property therefor, does not infringe const. U. S. 14th Amend. § 1, prohibiting the taking of private property without due process of law. — *Walston v. Nevin*, U. S. S. C., Dec. 10, 1888; 9 S. C. Rep. 192.

37. **CONSTITUTIONAL LAW** — Injunction — Taxes. — Act Mich. 1885, No. 153, § 107, providing that no injunction shall issue to stay proceedings for collection of taxes, is not unconstitutional in view of § 42 of the act. — *Eddy v. Township of Lee*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 792.

38. **CONSTRUCTIVE TRUST** — Evidence necessary to sustain a constructive trust. — *Curry v. Curry*, Ky. Ct. App., Dec. 8, 1888; 9 S. W. Rep. 831.

39. **CONTEMPT**—Commitment. — Code Iowa, § 3497, relating to contempt proceedings, is mandatory. — *Dorgan v. Granger*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 697.

40. **CONTRACT**—Performance—Mutuality. — A written agreement, signed by defendant only, promising to sell certain bonds for plaintiff by a day named at a fixed price, whenever he shall place them at his disposal, containing no promise by plaintiff to do anything, becomes mutually binding when performed by plaintiff by placing the bonds under defendant's control. — *Plumb v. Campbell*, S. C. Ill., Nov. 18, 1888; 18 N. E. Rep. 790.

41. **CONTRACT**—Evidence. — Weight of evidence on question of breach of contract to cut and haul timber. — *McDonald v. Miller*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 665.

42. **CONTRACTS** — Public Policy. — A contract that, in consideration of estimates furnished on the amount of timber on certain lands, one will, if he buy the lands, pay the land looker a commission, is not against public policy, because such estimates were made for the then owner of the lands paid for by him. — *Webster v. Bearinger*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 772.

43. **CONTRACTS** — Fraudulent Representations. — Weight of evidence on charge of fraudulent representations in procuring contract. — *Dennis v. Leaton*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 753.

44. **CORPORATIONS**—Insolvency — Receivers. — Revision N. J. p. 192, § 84, providing that where the property of an insolvent corporation in the hands of a receiver is incumbered with liens, "the legality of which is brought in question," and is of a character materially to deteriorate in value pending the litigation, the court may order a sale, is not limited to cases of liens assailed as void, but extends to contests as to priorities. — *Emmons v. Davis*, N. J. Ct. Chan., Nov. 2, 1888; 16 Atl. Rep. 158.

45. **CORPORATIONS**—Officers — Liability to Stockholder — Pledge. — In an action on a note, defendant pleaded that certain shares of stock in a corporation of which plaintiff was an officer were delivered as security for the note; that by plaintiff's negligence and misconduct as such officer the stock subsequently greatly depreciated in value, to defendant's damage: Held, that this defense was not available. — *Palmer v. Hawes*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 676.

46. **COSTS**—Married Woman. — Facts under which court held married woman liable for costs. — *Pfuger v. Pully*, N. J. Ct. Chan., Nov. 24, 1888; 16 Atl. Rep. 172.

47. **COUNTIES**—Supervisors—Appeal. — Under Laws 20th Gen. Assembly Iowa, ch. 197, providing for designation, by board of supervisors, of official newspaper, an appeal lies from the board in all cases. — *Brown v. Lewis*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 698.

48. **COUNTERCLAIM** — Set-off. — Civil Code Ky. § 96, in an action by a wife for divorce, and to be protected in her rights to land, the husband cannot, by cross-petition, ask to have the deed of the land, which was made to the wife and her bodily heirs, reformed in favor of the husband and his child by former marriage, but such must be through counterclaim. — *Grimes v. Grimes*, Ky. Ct. App., Dec. 13, 1888; 9 S. W. Rep. 840.

49. **COVENANTS**—Running with the Land — Agreement to Fence. — A covenant in a deed granting a right of way to a railroad company, stipulating that whenever any portion of the land crossing the line of the railway should be inclosed and used for pasturage the railway company should construct a fence on each side of the right of way, is not a covenant that runs with the land. — *G. C. & S. F. Ry. Co. v. Smith*, S. C. Tex., Nov. 27, 1888; 9 S. W. Rep. 863.

50. **CRIMINAL LAW**—Homicide—Evidence. — On trial for murder, testimony given by the prisoner upon the examination before the coroner, as to his actions and whereabouts on the evening of the homicide, is admissible in evidence, where it appears that the prisoner gave such testimony voluntarily, after being cautioned by the coroner that he need not say anything unless he chose. — *State v. Coffee*, S. C. Conn., July 7, 1888; 16 Atl. Rep. 161.

51. **CRIMINAL LAW**—New Trial—Evidence. — Where motion for a new trial based on incompetency of juror, and there are disputed questions of fact, where a reasonable doubt of defendant's guilt, the motion for a new trial should be sustained. — *State v. Cleary*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 778.

52. **CRIMINAL LAW**—Rape—Child — Statute. — In a prosecution for rape under section 12 of the Criminal Code, it is not necessary to prove that the prosecutrix has not reached the age of puberty, if it be shown that she is under 15 years of age. — *State v. Wright*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 594.

53. **CRIMINAL LAW**—Appeal — Record. — The overruling of defendant's motion for a new trial in a criminal case, on the ground of surprise and newly-discovered evidence, will be presumed correct on appeal, where the affidavits upon which it was based were not made a part of the record by a bill of exceptions or by order of court, though copied into the transcript by the clerk. — *McClure v. State*, S. C. Ind., Nov. 27, 1888; 18 N. E. Rep. 615.

54. **CRIMINAL LAW—Illegal Sale—Variance.**—Though the complaint charges keeping a house for the illegal sale of liquors in a certain city, and the evidence shows the house to have been partly in the city and partly in an adjacent town, the appellate court will not reverse the case for variance, as there may have been evidence that the part in which the liquors were kept was wholly within the city.—*Commonwealth v. Downey*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 581.

55. **CRIMINAL LAW—Evidence—Instructions.**—On an indictment for breaking into a depot with intent to steal, an instruction that the jury must believe the defendant guilty beyond a reasonable doubt, in order to convict, is properly given.—*Cox v. Commonwealth*, Ky. Ct. App., Nov. 24, 1888; 9 S. W. Rep. 804.

56. **CRIMINAL LAW—Change of Venue.**—Under the Kentucky statute which required the court to grant change of venue to an accused on the filing of a petition and two affidavits, a change will not be granted to one who merely files a petition, and offers neither affidavits nor witnesses.—*Wilkinson v. Commonwealth*, Ky. Ct. App., Sep. 13, 1888; 9 S. W. Rep. 826.

57. **CRIMINAL LAW—Homicide—Abortion.**—The common law rule that if life be destroyed in the commission of an abortion, whether the woman be quick with child or not, it is murder, or at least manslaughter, is not changed by Gen. St. Ky. ch. 29, art. 4, § 2.—*Peoples v. Commonwealth*, Ky. Ct. App., Dec. 4, 1888; 9 S. W. Rep. 810.

58. **CRIMINAL LAW—Forgery.**—It is not necessary that one who signs the name of another should have express authority to do so to relieve him of the penalties of forgery. If it appears from the proof that he had reasonable ground for considering that he had authority, and acted upon that belief, it is sufficient.—*Clairborne v. State*, S. C. Ark., Nov. 17, 1888; 9 S. W. Rep. 851.

59. **CRIMINAL LAW—Homicide—Self-defense.**—Where, upon a trial for murder, the undisputed evidence shows that defendant was attacked by deceased with a loaded gun while in the public highway, and that deceased advanced after repeated warnings to desist until within three rods of defendant, threatening to kill him, and was in the position of firing when defendant shot him, there is no issue for the jury as to the necessity of a retreat, or the possibility of avoiding the assault by any other reasonable means than by taking life.—*People v. Macon*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 784.

60. **CRIMINAL LAW—Larceny—Possession of Stolen Goods.**—On a trial for larceny, an instruction that the unexplained possession of recently stolen property is presumptive evidence of guilt, is erroneous.—*State v. Tucker*, S. C. Iowa, Dec. 20, 1888; 40 N. W. Rep. 725.

61. **CRIMINAL LAW—Burglary—Possession of Burglar's Tools.**—Upon an indictment for having in possession instruments of burglary, with intent to employ them, evidence that B was a burglar, safe-blower, pickpocket and thief, is competent as tending to prove the intent with which defendant had the tools.—*People v. Howard*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 789.

62. **CRIMINAL LAW—Perjury.**—On indictment for perjury, committed by a debtor on his examination in proceedings supplemental to execution, under Rev. Stat. Ind. 1881, § 815, allegations as to false statements as to property previously owned by him are immaterial, unless it is shown that such property still belonged to him.—*State v. Cunningham*, S. C. Ind., Nov. 27, 1888; 18 N. E. Rep. 613.

63. **CRIMINAL LAW—Libel—Indictment.**—An indictment for criminal libel, which avers that the defendant "did unlawfully and maliciously compose, write and cause to be printed and published of and concerning," etc., certain libelous matter, sufficiently informs the defendant of the offense with which he is charged.—*Tracy v. Commonwealth*, Ky. Ct. App., Dec. 6, 1888; 9 S. W. Rep. 822.

64. **CUSTOM AND USAGE—Contract.**—Question

whether parties in making contract dealt with reference to usage and custom of the petroleum exchange.—*Greeley v. Doran Wright Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 878.

65. **DAMAGES—Negligence.**—Where plaintiff was injured by being put off a train: *Held*, entitled to recover for fright and mental suffering, caused by defendant's negligence.—*Stutz v. Chicago, etc. R. Co.*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 653.

66. **DECEIT—False Representations—Instructions.**—In an action for false representations, an instruction that if defendant made positive statements, without knowing them to be true, on which plaintiffs relied, they are entitled to recover, is not prejudicial where the court subsequently instructs that the representations must have been made with intent to deceive, as it also fairly implies the necessity of such intent.—*Middleton v. Jerdee*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 629.

67. **DEED—Covenant—Condition.**—If it is doubtful whether a clause in a deed be a covenant or a condition, the court will incline against the latter construction.—*Woodruff v. Woodruff*, N. J. Ct. Chan., Oct. 16, 1888; 15 Atl. Rep. 4.

68. **DEED—Description—Certainty.**—A deed purporting to convey "the southeast corner" of a certain quarter section, without stating any dimensions, or one purporting to convey "the southwest fractional part of the north one-half" of a specified quarter section, not giving the dimensions, quantity or location, is void for uncertainty.—*Morse v. Stockman*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 679.

69. **DEED—Acknowledgment—Attestation.**—A deed executed in 1866 passes the legal title to land in Wisconsin, though not acknowledged or attested, as those formalities are only essential to entitle it to record.—*Leinenkugel v. Kehl*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 683.

70. **DESCENT AND DISTRIBUTION—Legacy Tax—Contingent Legacy.**—Question as to whether a contingent legacy is subject to taxation, under Laws N. Y. 1885, ch. 483, § 2.—*In re Cager's Will*, N. Y. Ct. App., Nov. 28, 1888; 18 N. E. Rep. 866.

71. **DIVORCE—Cruelty—Single Act—Repentance.**—A single act of cruelty, committed some time before final separation, will not entitle the complaining party to a divorce, when it appears by the testimony that he has been guilty of very gross misconduct on her part, especially when the husband shows that he has repented, and desires to regain the affections of his wife, and to live in peace with her.—*Lynch v. Lynch*, N. J. Ct. Chan., Nov. 30, 1888; 19 Atl. Rep. 175.

72. **DOWER—Devise—Indemnity.**—A widow is not entitled to indemnity from the estate for a mortgage executed before her marriage on lands devised to her in lieu of dower.—*Meyer v. Cohen*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 852.

73. **DOWER—Release—Mortgage.**—If a mortgagee, without the consent of a married woman, who united with her husband in a mortgage, conveying his real estate to indemnify an indorser of his note, take a new note, not signed by one of the makers of the original note, the inchoate interest of the wife in the land is thereby released, and cannot be sold under a foreclosure of the mortgage.—*Crawford v. Hazelrigg*, S. C. Ind., Nov. 28, 1888; 18 N. E. Rep. 603.

74. **DRAINAGE—Improvements—Commissioners.**—Commissioners appointed under Pub. Stat. Mass., ch. 189, for the direction of improvements on ponds and marshes, have authority only to do the work required of them by their appointment, and no continuous authority to renew such improvements or make others after they have once been completed.—*Smith v. Smith*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 693.

75. **EJECTMENT—Evidence—Construction of Will.**—Where the use of one-third of a house was devised to the widow and two-thirds to plaintiffs, and the resid-

uary estate to defendant and others, and defendant having taken possession of a part of the house, ejectment was brought against him, evidence that the widow waived the provisions for her in the will and claimed dower, and that provision in lieu of the will were made for her by the court, is admissible.—*Gilman v. Gilman*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 849.

76. ELECTIONS AND VOTERS—Bribery—Indictment.—Allegations in an indictment that the person bribed was a legal voter and entitled to vote at a legal election, and that defendant gave him two dollars, and he, influenced thereby, voted for a candidate for an office named, sufficiently describes the offense of bribery, under Gen. Stat. Ky., ch. 33, § 12, art. 12.—*Commonwealth v. Selby*, Ky. Ct. App., Dec. 6, 1888; 9 S. W. Rep. 879.

77. ELECTIONS AND VOTERS—Violation of Election Law—Poll Book.—When a clerk of election is indicted, under Gen. Stat. Ky., ch. 33, § 5, art. 12, for making a false entry on the poll book of votes actually cast, it is not material whether the persons whose votes he entered were or were not registered voters.—*Commonwealth v. Duff*, Ky. Ct. App., Dec. 6, 1888; 9 S. W. Rep. 816.

78. EMINENT DOMAIN—Decree.—The right of the judge to enter a preliminary decree in condemnation proceedings cannot be questioned by the petitioner after it has voluntarily appeared before such judge and offered testimony.—*Chicago, etc. Co. v. Ward*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 828.

79. EMINENT DOMAIN—Compensation—Right of Way.—On the assessment of damages for taking for a railroad pasture land not abutting on a highway, where there is appurtenant to the land a cartway to the public road, it is proper to refuse to charge that, if the way is through gates and bars for the passage of cattle, and if the pasture is converted into building lots, occupants of cottages on it will not be entitled to the right of way.—*Fitz v. Nantasket Beach R. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 592.

80. EMINENT DOMAIN—Evidence—Damages.—The taking for public use of land, which is already subject to a right of way, may be an injury to the adjoining land of the owner; and, if not appearing that he has no beneficial use in connection with the land so taken, evidence to show damage is properly admitted.—*Tyler v. Town of Hudson*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 582.

81. EQUITY—Master in Chancery—Report.—A report of a master in chancery, which is returned into court, sealed up and indorsed "fees to be paid before opening," is not filed.—*Donaldson v. Johnson*, S. C. R. I., Oct. 10, 1888; 16 Atl. Rep. 140.

82. EQUITY—Cancellation—Confidential Relations.—A deed procured by the grantee while acting as the grantor's counsel, made in trust for the grantor's children, containing no power of revocation, but under which the grantee represented that he would have power to reconvey, will be set aside, though the grantee did not intend to mislead.—*James v. Steere*, S. C. R. I., Dec. 6, 1888; 16 Atl. Rep. 143.

83. EQUITY—Rescission—Mental Incapacity.—Executive contracts of an imbecile, though voidable, can only be set aside at his instance by his doing equity, and placing in original condition the one who executed his contract with him.—*Gates v. Cornett*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 740.

84. EVIDENCE—Res Gestæ—Mental Condition.—Where the mental condition of the defendant is part of the *res gestæ*, his conduct pertinent to the inquiry, by being reasonably explanatory of it, is competent evidence in his own favor.—*Schlenger v. State*, S. C. N. J., Nov. 12, 1888; 15 Atl. Rep. 836.

85. EXECUTORS AND ADMINISTRATORS—Accounting.—On bill to surcharge and falsify, an administrator cannot be charged with notes and lumber of the estate which are not mentioned in his accounts.—*McLeod v. Griggs*, S. C. Ark., Nov. 26, 1888; 9 S. W. Rep. 858.

86. EXECUTORS AND ADMINISTRATORS—Insolvent Estate.—Construction of Pub. Stat. R. I., ch. 186, § 13, providing for the appeal of any person dissatisfied with the allowance by commissioner.—*Harris v. Angell*, S. C. R. I., Oct. 20, 1888; 16 Atl. Rep. 142.

87. EXECUTORS—Laches.—Court refused to open executor's accounts confirmed some time theretofore, upon the petition of the representatives of two legatees, who claimed misconduct and fraud, it appearing that plaintiff's intestates were of full age at the passing of the accounts and lived for some time thereafter without making any complaint.—*Richardson v. Billinglea*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 65.

88. EXECUTORS AND ADMINISTRATORS—Appointment—Renunciation.—An action will not lie by an heir to compel the person named as executor in the will to qualify or formally renounce the appointment, and to compel the filing of an inventory of decedent's property in his possession.—*Cable v. Cable*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 700.

89. EXECUTION—Levy—Abandonment.—Where one pays and takes an assignment of an execution which has been levied on real estate, and which is afterwards returned, and neglects to enforce the levy for more than two years, and agrees to be responsible for the rent of the property to the purchaser under a subsequent execution if the latter will refrain from ejecting the debtor, his levy, as to third persons with or without notice, must be considered abandoned.—*Cook v. Clemens*, Ky. Ct. App., Dec. 1, 1888; 9 S. W. Rep. 820.

90. EXECUTION—Sale—Redemption.—Construction of Code Iowa, §§ 3112-3115, providing for redemption of land after execution sale.—*Tharp v. Forrest*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 718.

91. FORCIBLE ENTRY AND DETAINER—Procedure.—The Illinois statute of forcible entry and detainer, prescribing the mode of procedure to obtain the remedy, excludes all other modes.—*French v. Miller*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 611.

92. GARNISHMENT.—Where the purchasers in a bill of sale agree to pay the amount of the consideration upon certain debts of the seller, as the seller shall direct, and they pay all of such debts except those of which payment is refused by the creditors, the balance remaining in their possession is subject to garnishment by creditors refusing to receive payment.—*Green & B. Co. v. Marshall*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 648.

93. GRANT—Use of Street.—The grant by a city to a street railway corporation upon a valuable consideration of the right to lay tracks and run cars on the city streets and to make traffic contracts with another company giving such other company the right to run cars over its tracks, without any condition in the grant in respect to the duration of such contract rights or otherwise, is not a license, but the conveyance of an estate in perpetuity.—*People v. O'Brien*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 692.

94. GUARANTY—Evidence—Waiver.—In an action on a guaranty, where the defense is negligent delay in bringing action to collect the debt guaranteed, evidence of acquiescence of defendant in the delay is admissible as showing a waiver of strict performance on the part of plaintiff, and the exercise of due vigilance by him.—*Mead v. Parker*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 727.

95. GUARANTY—Statute of Frauds—Judgment.—An accommodation indorser of a note who has an interest in a judgment against the maker, and who, being held as indorser, borrows money to pay the note, uniting with his co-owner in an assignment of the judgment to the lender to secure him, and guarantying its payment, makes the guaranty for his own benefit, and the undertaking is not within the statute of frauds.—*Little v. Edwards*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 134.

96. HIGHWAYS—Tax—Assessment.—Construction of How. St. Mich. §§ 1326, 1379, 1381, authorizing assessment for improving highways and bridges.—*Longyear Alpin*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 738.

97. HIGHWAYS—Taxation—Statutes—Construction.—Section 110 of the road act (Revision, 1015) does not apply to the county of Atlantic. Under the act of 1846 (Revision, p. 1194, § 11) the townships in said county may raise such sum for road purposes as may be required.—*State v. Veal*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 159.

98. HIGHWAYS—Statute—Assessment of Damages.—Construction of Pub. St. Mass., ch. 49, § 78, providing for the assessment of damages by jury in case of laying out or altering highways.—*Keith v. City of Brockton*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 585.

99. HIGHWAY—Construction.—Power of road supervisor in reference to street improvement and grading under acts 21st Gen. Assembly Iowa, ch. 87.—*Randall v. Christiansen*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 703.

100. HOMESTEAD—Conveyance—Judgment.—One occupying land as his homestead conveyed it to his children, reserving a life estate: Held, on his death, that the land could not be subjected to the payment of a judgment recovered against him prior to the conveyance, and subsequent to its acquisition as a homestead.—*Richart v. Utterback*, Ky. Ct. App., Dec. 8, 1888; 9 S. W. Rep. 825.

101. HOMESTEAD—Occupation after Levy.—Occupancy of land as a homestead, after the levy of an attachment upon it, will not relieve it of the lien thereof.—*Reynolds v. Tenant*, S. C. Ark., Nov. 17, 1888; 9 S. W. Rep. 857.

102. HUSBAND AND WIFE—Judgment—Execution.—An execution may issue on a judgment in favor of a wife against her husband, without the husband's consent.—*Kinkade v. Cunningham*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 905.

103. INJUNCTION—Bond.—Where an injunction bond, given in a suit to restrain the funding and payment of county bonds, is conditioned to pay damages sustained by the person designated as defendants and all holders of the bonds, it is no defense to an action on the bond that plaintiffs were not designated defendants in the injunction suit.—*Alexander v. Gish*, Ky. Ct. App., Dec. 15, 1888; 9 S. W. Rep. 801.

104. INSURANCE—Waiver of Proofs.—Facts stated under which the court held that defendant had waived further proofs and had also waived a provision of the policy requiring suit to be brought within a certain time.—*Jennings v. Metropolitan, etc. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 601.

105. INSURANCE—Fire—Powers.—Acts, Mich., 1883, No. 175, having been declared unconstitutional, the provision of How St. § 4249, prohibiting mutual fire insurance companies from doing business in more than three counties, remains in force.—*Eddy v. Merchants', etc. Co.*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 775.

106. INSURANCE—Condition in Policy—Temporary Suspension.—A condition in a policy of fire insurance upon a shingle-mill that, "if the premises shall become vacant or unoccupied," without notice to and consent of the company, the policy shall be void, is not broken by a temporary suspension.—*City Plasing, etc. Co. v. Merchants', etc. Ins. Co.*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 777.

107. INTERPLEADER.—Construction of Rev. St. Wis. § 2610, and amendment Laws 1883, ch. 41, providing for substitution of interpleader, in place of defendant.—*Baxter v. Day*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 675.

108. INTOXICATING LIQUORS—Licenses—Power.—The court of common pleas of Mercer county has no power to grant a license to keep an inn and tavern in the borough of Princeton. The common council of the borough has the exclusive power to grant license to sell intoxicating liquors within said borough.—*Cook v. Ct. Common Pleas*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 176.

109. INTOXICATING LIQUORS—Complaint—Variance.—complaint charging that defendant "did keep and

maintain a certain common nuisance, to-wit, a building, to-wit, a tenement in a building, used for the illegal sale and illegal keeping of intoxicating liquors," is not inconsistent in its description of the place, but charges the offense of keeping a tenement in a building for such illegal use.—*Commonwealth v. Lee*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 586.

110. INTOXICATING LIQUORS—Illegal Sale—Intent.—An allegation in a complaint that defendant had intoxicating liquor, with "intent unlawfully to sell the same within the commonwealth," is sufficient, though not alleging an intent to sell in the place where the liquor is kept.—*Commonwealth v. Gillon*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 582.

111. INTOXICATING LIQUORS—Married Woman—Coercion.—On the trial of a married woman for illegally selling intoxicating liquors, an instruction that the presence of defendant's husband on the premises and in the house, at the time of the sales, would be sufficient to raise the presumption of coercion, is properly refused.—*Commonwealth v. Daley*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 579.

112. INTOXICATING LIQUORS—Nuisance—Injunction.—Construction of Acts 21st Gen. Assembly Iowa, ch. 66, § 2, providing for temporary injunction against a liquor nuisance.—*Tibbets v. Burster*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 707.

113. INTOXICATING LIQUORS—Civil Damage Law—Intoxicated Persons.—In an action under the Pennsylvania statute for damages for selling liquor to a person while drunk or to one of known intemperate habits, it is not error for the court to charge that, "whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated, though he can walk straight, though he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk."—*Elkin v. Buschner*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 102.

114. INTOXICATING LIQUORS—Sale—Minors.—Construction of How St. Mich. § 2268, providing amount of damages recoverable of one selling liquors to minors.—*Theisen v. Johns*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 727.

115. IRRIGATION DITCH—Real Property.—Facts stated showing abandonment and claim by uses of irrigation ditch but held such interest is real property and only to be acquired by deed, prescription or condemnation.—*Bonham v. Freeman*, S. C. Colo., Nov. 30, 1888; 19 Pac. Rep. 761.

116. JAILS AND JAILERS—Bail-bonds—Escape.—Under Pub. St. R. I. ch. 225, §§ 1, 6, providing for forfeiture of bail-bond of one imprisoned for debt, it is not only a breach of the bond but an escape for a person to fail to render himself up or make an assignment as required by the statute.—*In re McManaman*, S. C. R. I., Nov. 24, 1888; 16 Atl. Rep. 148.

117. JUDGE—Jurisdiction.—Where a judge acting in a matter within his jurisdiction enters such order without notice he is not liable to the party aggrieved thereby, though the act was in excess of his jurisdiction.—*Hughes v. McCoy*, S. C. Cal., Oct. 26, 1888; 19 Pac. Rep. 674.

118. JUDGMENT—Mistake—Amendment.—Mistake in the form of the judgment may be amended in that court or ordered on appeal.—*Hood v. Speath*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 163.

119. JUDGMENT—Divorce.—A judgment in a divorce suit granting a divorce, is a final judgment; and a modification thereof by incumbering land given to plaintiff with a lien for the payment of a sum to defendant, and providing for the sale of the land unless plaintiff mortgage it to a trustee to secure the sum, made more than one year after its rendition, is without jurisdiction, and void.—*Thompson v. Thompson*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 671.

120. JUDGMENT.—Facts sufficient to justify court in setting aside judgment obtained through mistake

inadvertence, surprise or excusable neglect, under Rev. Stat. Wis. § 2832.—*Black v. Hurbut*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 673.

121. JUDGMENT—Fraudulent Entry—Innocent Purchasers.—A judgment for money rendered by agreement, in an action against a railway company for obstructing a water-course and injuring plaintiff's land, which the clerk, by plaintiff's fraudulent misrepresentations, has entered with an agreement added that defendant shall construct a culvert of certain dimensions, cannot be amended as against the grantee, who is an innocent purchaser for value without notice.—*Indiana, etc. R. Co. v. Bird*, S. C. Ind., Dec. 11, 1888; 18 N. E. Rep. 887.

122. JURISDICTION—Mechanic's Lien.—The superior court of Denver has jurisdiction both over the cause of action and person of the defendant in an action to foreclose a mechanic's lien, brought by a material man against a non-resident of the county who contracted for the erection of certain buildings in said city, the material having been furnished with the knowledge and consent of defendant, and process served upon him within the territorial jurisdiction of the court.—*Weiner v. Rumble*, S. C. Colo., Nov. 30, 1888; 19 Pac. Rep. 761.

123. JURY—Commissioners.—In impaneling of jury by county commissioners, a motion to quash panel on ground that one of the commissioners had an action in court to be determined by a jury will be overruled, in the absence of showing partiality or unfairness.—*Northwestern R. Co. v. Frasier*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 604.

124. JURY—Competency.—On a trial for forging and uttering discharges for money payable from a town and county treasury, the inhabitants of that town and county are not disqualified to serve as grand or trial jurors, there being no provision for finding or trying an indictment for such offense in another county.—*Commonwealth v. Brown*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 587.

125. LANDLORD AND TENANT—Lease—Construction.—A lease gave the lessee the privilege of purchasing the leased premises at any time before the expiration of the term. The lessee failed to tender the purchase money and demand a deed until two years after the expiration of the term: *Held*, that the lessee had forfeited his right to a conveyance.—*Kruegel v. Berry*, S. C. Tex., Nov. 13, 1888; 9 S. W. Rep. 863.

126. LANDLORD AND TENANT—Assignment—Mortgages—Recording.—Indexing and recording a mortgage which contains an assignment of rents, as a real estate mortgage only, is not a constructive notice of such assignment to third persons.—*Trulock v. Donohue*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 636.

127. LANDLORD AND TENANT—Tenancy at Will.—Code Iowa, § 2014, changes the common law rule of tenancy from year to year to that of tenancy at will.—*O'Brien v. Troxel*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 704.

128. LANDLORD AND TENANT—Leases—Property Covered.—Where a store covers the whole of the lot upon which it stand, a lease of the building, "together with all and singular the benefits, liberties and privileges to the said premises belonging," covers the entire premises, and not the building alone.—*Chesebrough v. Pingree*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 747.

129. LIBEL AND SLANDER.—A charge that a butcher slaughters and sells diseased and unwholesome meats is *per se* actionable.—*Young v. Kuhn*, S. C. Tex., Nov. 2, 1888; 9 S. W. Rep. 860.

130. LIBEL AND SLANDER—Words Actionable.—Words spoken, that one "used" his daughter, are capable of the meaning ascribed to them by the innuendoes in a complaint for slander, and words, in connection with them, when spoken by the daughter's husband, that "the children are not mine; they are from him," may mean that the husband disclaimed the paternity

of his wife's children, and asserted that they were from plaintiff.—*Guth v. Lubach*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 681.

131. LIEN—Logs and Logging.—Question of sufficiency of evidence to sustain lien on logs, under Laws Mich. 1887, p. 279.—*Demars v. Conrad*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 730.

132. LIFE INSURANCE—Policy—Conditional Delivery.—Where one receives from an agent a policy of life insurance, giving his notes and a check therefor, and delivers to the agent policies in other companies, on the agreement that the agent shall obtain for them their surrender value or paid up policies, and the agent fails to accomplish his undertaking, the policy does not become operative, and it may be returned, and the notes and checks recovered.—*Harnickell v. New York, etc. Co.* N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 632.

133. LIFE INSURANCE—Application—Misrepresentation—Action on life policy. Defense misrepresentation in application, as to disease—vertigo:—*Held* that, as the vertigo was merely temporary, and the condition of the insured was fully restored, it cannot be regarded as material, and, under act Ky., Feb. 4, 1874, providing that such statements are to be held as mere representations, and not warranties, it cannot prevent a recovery.—*Mut. Ben. Life Ins. Co. v. Davless*, Ky. Ct. App., Nov. 22, 1888; 9 S. W. Rep. 812.

134. LIFE INSURANCE—Fraternal Societies.—An association organized for benevolent purposes, which secures its members by the lodge system, requiring an initiation fee and assessments, and which in case of accidental disability pays a weekly amount, is not a life insurance company, within the meaning of How. Stat. Mich. § 4225.—*Reesehouse v. Seeley*, S. C. Mich., Nov. 22, 1888; 40 N. W. Rep. 765.

135. LIMITATION.—A complaint in an action commenced in March, 1887, which alleges that the services sued for were performed between the months of September and December, 1873, but fails to allege that any time was fixed for payment, shows on its face that the cause of action did not accrue within the statutory period of six years.—*Tucker v. Lorejoy*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 627.

136. LIMITATION—Statute.—2 Rev. Stat. N. Y., p. 301, art. 6, §§ 49-51, making the statute of limitations applicable to cases where the law and equity courts had concurrent jurisdiction, was a re-enactment of the former rule, and is not repealed by Code N. Y. 1848 (Laws 1848, p. 511, § 66), repealing the Revised Statutes as to the limitation of actions.—*Bulter v. Johnson*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 643.

137. LIMITATIONS—Adverse Possession.—Question of weight of evidence to sustain claim of title by adverse possession.—*Strutton v. Strutton*, Ky. Ct. App., Dec. 8, 1888; 9 S. W. Rep. 826.

138. LIMITATION OF ACTIONS—Adverse Possession.—Actual possession of one-quarter of a quarter section of land, under a registered patent for the whole, is not possession of the whole, as against a senior patentee of another part of the quarter section.—*Turner v. Stephenson*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 733.

139. LOTTERIES—Illegal Sale.—On indictment for selling lottery tickets the tickets were admissible, though purporting to be numbers in a horse race, leaving the main issue for the jury.—*Boydland v. State*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 132.

140. MANDAMUS—Supersedeas.—Where a *supersedeas* would be useless, *mandamus* will not lie to compel its issuance.—*Middleton v. McCullough*, S. C. Ark., Nov. 3, 1888; 9 S. W. Rep. 844.

141. MARINE INSURANCE—Abandonment—Acceptance.—Where an insurer, upon notification of an abandonment of a vessel, gets it off, brings it to port, repairs it at great expense, and never offers to return it, the abandonment is thereby accepted, and the company must pay the full amount of the policy.—*Richelieu, etc.*

Co. v. Thames Ins. Co., S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 758.

142. **MARRIED WOMAN—Husband and Wife.**—*Laws N. Y.* 1862, ch. 172, § 7, providing for right of action against a married woman, does not abrogate the common law rule of the husband's liability for the wife's torts.—*Mangam v. Peck*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 617.

143. **MASTER AND SERVANT.**—The master is responsible for the act of his employee or servant, when the act is done in the prosecution of the business that the employee or servant was engaged by the master to do. When, therefore, the employee or servant, while engaged in the prosecution of the master's business, deviates from his instructions as to the manner of doing it, this does not relieve the master from liability for his acts.—*Atchison, etc. Co. v. Randall*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 783.

144. **MASTER AND SERVANT—Negligence—Injury.**—Facts reviewed with reference to liability of master for injury to servant where it was a question whether defective machinery or negligence of a fellow-servant caused the injury.—*Stringham v. Stewart*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 870.

145. **MASTER AND SERVANT—Injury—Negligence.**—Where a servant is injured in attempting to obey an order to move a heavy weight, with insufficient help, he cannot recover from the master therefor, when the latter's uncontradicted evidence shows that there were other men on the premises who might have been called to assist, and all necessary implements.—*Dunlap v. Barnaby, etc. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 590.

146. **MASTER AND SERVANT—Injury—Negligence.**—Plaintiff's duty being to clean a wheel, and an injury having occurred in attempting so to do, the jury are warranted in finding that such injury was caused by defendant's negligence, as if plaintiff had been properly instructed, the injury might not have occurred.—*Glover v. Dwight Manfg. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 597.

147. **MASTER AND SERVANT—Negligence.**—Under a contract to construct a tunnel for a city, binding defendants, the contractors, to furnish "all facilities" for inspection, they are not required to furnish the inspector transportation in and out of the tunnel, and are not liable for his death, caused by the negligence of their servant.—*Morris v. Brown*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 722.

148. **MEASURE OF DAMAGES—Insurance.**—The measure of damages for breach of contract to insure is the sum which the policy was to insure, if the property be insured, and which was destroyed by fire during the time of the life of the policy as it was agreed to be insured, was of that value.—*Campbell v. Amer. Fire Ins. Co.*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 661.

149. **MECHANICS' LIENS—Pleading.**—Where there is annexed to the complaint for foreclosure of a mechanic's lien the contract under which some of the articles were furnished, and a bill of particulars of the other articles and services for which the lien is claimed, a motion to make the complaint more definite is properly denied.—*Barnes v. Stacy*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 615.

150. **MORTGAGES—Foreclosure.**—Failure to produce the bond secured is not fatal to an action to foreclose a mortgage, where the mortgage itself expressly admits the indebtedness contains a covenant to pay the sum due, and authorizes foreclosure in case of default.—*Minnow v. Wilson*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 835.

151. **MORTGAGES—Foreclosure—Attorney's Fees.**—Where, on foreclosure of a mortgage, the court makes an allowance for attorney's fees in addition to the sum stipulated for in the mortgage, but before appeal is taken plaintiff remits the excess, the error is cured.—

Killips v. Stephens, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 652.

152. **MUNICIPAL CORPORATIONS—Defective Street Crossing—Notice.**—A petition in an action against a municipal corporation for injuries received at a defective street crossing, which charges defendant with negligently making the crossing, is sufficient, without alleging notice of the defect; but where it is further alleged that defendant allowed the crossing to become out of repair, notice of its condition must be alleged.—*City of Austin v. Ritz*, S. C. Tex., Dec. 4, 1888; 9 S. W. Rep. 884.

153. **MUNICIPAL CORPORATIONS—Public Improvements—Assessment.**—Manner of assessing property with the cost of paving and curbing street, under the provisions of § 4, ch. 99, Laws 1887.—*Blair v. City of Atchison*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 815.

154. **MUNICIPAL CORPORATIONS—Police Power—Statute.**—Under § 61, ch. 19, Comp. Laws 1885, the police power of the city can only be extended outside of the corporate limits and within five miles therefrom, over such lands as are necessary for hospital purposes and water-works; and over these only to the same extent as over public cemeteries.—*State v. Franklin*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 801.

155. **MUNICIPAL CORPORATIONS—Public Improvements—Ordinance.**—Determination of sufficiency of ordinance under Rev. St. Ill. ch. 24, art. 9, § 19, providing for specifications in ordinance for local improvements.—*Pearce v. Hyde Park*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 824.

156. **MUNICIPAL CORPORATIONS—Ordinances—Height of Buildings.**—*Laws N. Y.* 1885, ch. 454, providing that "the height of all dwelling houses, and of all houses used or intended to be used as dwellings for more than one family," thereafter to be erected in New York city, shall not exceed 80 feet in streets exceeding 60 feet in width, do not apply to hotels.—*Kemp v. D'Oench*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 864.

157. **MUNICIPAL CORPORATION—Assessment Notice.**—Sufficiency of notice of protest under which defendant paid taxes assessed for grading street.—*City of Omaha v. Kountz*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 597.

158. **MUNICIPAL CORPORATIONS—Public Improvements.**—A contract whereby a city agrees to pay a certain sum in completion of certain water-works creates a debt against the city for the amount to be so paid from the time of execution of such contract.—*Culbertson v. City of Fulton*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 781.

159. **MUNICIPAL CORPORATIONS—Police Commissioners—Mayor.**—Construction of 2 Rev. St. Mo. 1879, p. 1528, establishing police commissioners, as to the powers and rights of the mayor, who is ex-officio president.—*Francis v. Blair*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 894.

160. **MUTUAL BENEFIT ASSOCIATION—Insurance.**—As to the right of a member of a mutual benefit society to change beneficiary named in the policy and assign same to a creditor as security for a debt.—*Martin v. Stubbings*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 657.

161. **NEGLECTANCE.**—Question of negligence on part of railroad in failing to restore a highway over which it had laid its track, and which caused injury to plaintiff.—*Dallas & G. Ry. Co. v. Able*, S. C. Tex., Nov. 30, 1888; 9 S. W. Rep. 871.

162. **NEGLECTANCE—Defective Highway.**—Though a person injured by a defect in a street, after dark, knew that such defect existed, but did not know that it was dangerous, he cannot be said, as a matter of law, to be guilty of contributory negligence in attempting to use the street; but the question is for the jury.—*City of Richmond v. Mulholland*, S. C. Ind., Nov. 26, 1888; 18 N. E. Rep. 832.

163. **NEGLECTANCE—Railroad Company.**—Facts reviewed under the question as to whether there was contributory negligence, on part of person injured while attempting to drive over railroad track in front of train.—*Hoag v. New York, etc. Co.*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 648.

164. NEGLIGENCE.—Question of fact as to contributory negligence on part of plaintiff, though defendant was negligent.—*Kreuzinger v. C. & N. W. R. R. Co.*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 657.

165. NEGLIGENCE—Evidence.—In action for negligence, held, improper to ask plaintiff, who stated he owned a mill, what amount of liens were on his mill.—*Berry v. C. & N. W. Ry. Co.*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 687.

166. NEGOTIABLE INSTRUMENTS—Drafts—Acceptance.—One who writes a draft directed to himself, payable to the drawer's order, and accepts it without the signature of the drawer, and delivers it to him to enable him to raise money, gives him authority to sign it, and is liable to an indorser for value before maturity, though it was not signed till after indorsement, on refusal of the acceptor to pay on that ground, and had been accepted without consideration.—*Hopps v. Savage*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 133.

167. NOVATION—Extinguishment.—To constitute a novation of parties there must be an extinguishment of the old debt by a mutual agreement between all parties, whereby it becomes the obligation of the new debtor. The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor.—*Coracell v. Meigs*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 610.

168. NUISANCE—Action—Damages.—An action will lie against an individual or private corporation maintaining a nuisance, by one who has suffered special damage therefrom.—*Mehrf, etc. Co. v. Deleware, etc. Co.*, S. C. N. J., Nov. 12, 1888; 15 Atl. Rep. 12.

169. NUISANCE—Navigable Waters.—Under Code Iowa, § 3331, providing that whatever is "an obstruction to the free use of property" is a nuisance, action does not lie by owner of boat on a lake against proprietors of a bridge though it has materially injured business.—*Innis v. Cedar Rap. etc. Co.*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 701.

170. PARTIES—Substitution—Amendment.—An action against a county treasurer and his sureties was brought at the relation of the board of commissioners, which was held not to be the proper relator. A new complaint was then filed, called an "amended complaint," in which the county auditor was substituted as relator: Held, an amendment, and not a new action.—*Fleener v. Taggart*, S. C. Ind., Nov. 26, 1888; 18 N. E. Rep. 606.

171. PARTNERSHIP—Dormant Partner—Withdrawal.—A dormant partner is liable for goods sold the firm subsequent to his withdrawal from it, if plaintiff had no notice of his withdrawal, and believed him to be still a member.—*Leib v. Craddock*, Ky. Ct. App., Nov. 20, 1888; 9 S. W. Rep. 838.

172. PENAL ACTION—Demand.—Under § 16, ch. 60, Comp. Laws 1885, a demand is necessary before an action can be maintained to recover the penalty therein named; and, where an action is brought without a demand first having been made, such action is prematurely brought.—*Hall v. Hurt*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 802.

173. PLEADING—Judgment—Default.—Sufficiency of statement under Md. act 1856, § 172, relating to judgments by defaults.—*Thillman v. Shadrick*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 188.

174. POWERS—Testamentary—Administrator de Bonis Non.—An administrator de bonis non with the will annexed does not succeed to a discretionary power vested in the executor to pay, not exceeding a certain sum, to a grandson of the testatrix on his attaining the age of 21 years, for his advancement in business, in separate sums, or not to pay it at all, it not appearing from the will that the testatrix intended the administrator to exercise it.—*Rhode Island, etc. Co. v. Pitcher*, S. C. R. I., Oct. 20, 1888; 16 Atl. Rep. 141.

175. POWERS—Devise.—Effect of a devise of the use and improvement of all testator's property for life with

liberty to the devisee to use so much of the principal as she might deem necessary, empowering her to sell, dispose, and to change investments and reinvest with remainder over.—*Hoxie v. Finney*, S. J. C., Mass., Nov. 28, 1888; 18 N. E. Rep. 698.

176. PRACTICE—Amendment—Partnership.—Power to amend pleading under How. St. Mich. § 7631, where partnership was sued and there was misnomer of one of the firm.—*Welch v. Hull*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 797.

177. PRINCIPAL AND AGENT—Release.—Where the only authority of an agent is to receive rents, to make and enforce collections, and to sue when he thinks advisable, he does not have the power to bind his principal by taking the notes of a third person in payment of the rent of a tenant, and thereby releasing him from his indebtedness.—*Scully v. Dodge*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 807.

178. PUBLIC LANDS—Reservation.—Construction of act congress approved July 12, 1862, extending grant of lands to the State of Iowa.—*Whitehead v. Plummer*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 709.

179. QUIETING TITLE—Possession—Tax deed.—Facts showing actual possession of property such as to enable a person to maintain action under § 594 of the Civil Code to quiet his title thereto.—*Hoffman v. Woods*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 805.

180. RAILROAD COMPANY—Negligence—Prima Facie Evidence.—The rule prescribed by chapter 155 of the Laws of 1885, that the occurrence of a fire caused by the operation of a railroad is prima facie evidence of negligence on the part of the railroad company, applies to all cases where the fire results from any step in the operation of the road.—*Mo. Pac. Ry. Co. v. Merrill*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 798.

181. RAILROAD COMPANIES—Stock-killing—Venu.—In a statutory action to recover the value of a colt killed by a railroad company in the operation of its trains, the pleading must allege, and the evidence show affirmatively, that the action is brought in the county in which the animal was killed.—*Kansas City, etc. Co. v. Burge*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 791.

182. RAILROAD COMPANY—Negligence—Crossing.—Respecting the duty of a railroad company at crossing.—*Atchison, etc. Co. v. Wals*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 787.

183. RAILROAD COMPANIES—Statute—Municipal Aid.—Construction of Laws of Wis., 1878, ch. 155, 1879, ch. 197 and 1885, ch. 172, authorizing county to aid railroad building.—*State v. Harshaw*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 641.

184. RAILROAD COMPANIES—Fires—Evidence.—An action for damages for fire set by a locomotive, the fact that defendant's inspector has testified that the screen used on the engine alleged to have emitted the sparks was the same as was used on all the engines on the road, does not entitle the plaintiff to show in rebuttal that fires frequently sprung up after the passage of other engines.—*Allard v. C. & N. W. R. R. Co.*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 685.

185. RAILROAD COMPANIES—Taxation.—Under act Ky. 1864, taxing the railroads of the State specifically at the rate of \$20,000 per mile, each railroad is regarded as an entirety, and not subject to fragmentary local taxation.—*Commonwealth v. L. & N. R. R. Co.*, Ky. Ct. App., Nov. 27, 1888; 9 S. W. Rep. 805.

186. RECEIVERS—Solicitor—Corporation.—Independent counsel and solicitor for the receiver of an insolvent corporation should be appointed, instead of permitting the counsel and solicitor of the complainant, in the proceeding to wind up the corporation, to act for him.—*Emmons v. Davis*, N. J. Ct. Chan., Nov. 2, 1888; 16 Atl. Rep. 157.

187. RES ADJUDICATA—Railroad Company.—Where cinders from defendant's locomotive injured grass and wood in two lots owned by plaintiff, and on suit on com

plaint alleging injury to both lots judgment was rendered for plaintiff, and thereafter defendant was sued for the injury to one of the two lots by the fire, plaintiff claiming that in the first suit damages were only recovered for injuries to the other lot: *Held*, that the former judgment was a bar to this suit. — *Knowlton v. New York, etc. Co.*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 580.

188. SALE—Land—Payment. — In the absence of any stipulation, the price to be paid for land is payable at the office of the vendors or their agents or to them personally. — *Greenawalt v. Este*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 883.

189. SALE—Payment. — *Held*, that title to personal property had passed upon delivery on board of vessel, under the facts where goods were sold plaintiff. — *Farmers' Phosphate Co. v. Gill*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 214.

190. SPECIFIC PERFORMANCE — Contract—Land. — Certainty of description required in contracts for sale of land, in order to entitle party to specific performance. — *Watson v. Baker*, S. C. Tex., Nov. 13, 1888; 9 S. W. Rep. 867.

191. SPECIFIC PERFORMANCE—Contract—Performance. — Facts under which court will grant specific performance of contract partly performed. — *Nunez v. Morgan*, S. C. Cal., Nov. 7, 1888; 19 Pac. Rep. 733.

192. SPECIFIC PERFORMANCE—Unilateral Contract. — Unilateral contracts for the purchase of lands may be enforced by the vendor. — *Miller v. Cameron*, N. J. Ct. Chan., Nov. 16, 1888; 15 Atl. Rep. 842.

193. STATUTE OF FRAUDS — Promise to pay Debt of Another. — Question whether agreement under facts of this case was in the statute of frauds. — *Benbon v. Sooy-smith*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 603.

194. TAXATION—Assessment—Injunction. — In the absence of fraud, a court of equity will not enjoin the collection of a valid tax, on the ground that the assessment is excessive. — *LaSalle, etc. Co. v. Donaghue*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 827.

195. TAXATION — Corporation — Manufacturing Companies. — The business in which the capital of a corporation is invested, and not the objects for which the company was incorporated, as expressed in the certificate of incorporation, determines its liability to taxation, under the tax-law of April 18, 1884, Supp. Revision, 1017. — *Press Printing Co. v. State*, S. C. N. J. Nov. 30, 1888; 16 Atl. Rep. 173.

196. TAXATION—Assessment—Partnership. — Construction of Mich. Tax act of 1885, providing that for purposes of taxation a firm shall be treated as an individual. — *Hill v. Graham*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 779.

197. TOWNS—Claim. — Construction of Rev. St. Wis. § 824 and amendment 1882, ch. 162, prescribing procedure in filing of claim against towns. — *Schriber v. Town of Richmond*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 644.

198. TOWN OFFICERS — Election — Statute. — Construction of the act March 22, 1869, (Revision p. 209, § 45), providing for the election of town officers. — *State ex. rel. Brown v. Boden*, S. C. N. J. Nov. 20, 1888; 16 Atl. Rep. 58.

199. TRIAL—Instruction. — The court may refuse an instruction if satisfied that it is erroneous although it may have previously indicated that it may be given. — *Louisville, etc. Co. v. Hubbard*, S. C. Ind., Nov. 27, 1888; 18 N. E. Rep. 611.

200. TRUSTS—Beneficiary—Powers of Court. — Where a will leaves property in trust to the executors named therein, or such of them as might qualify, and the only person who qualifies as executor is also a beneficiary under the will, the court properly directs in detail the execution of the trust, through its own officers. — *Rogers v. Rogers*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 638.

201. TRUST—Parol Agreement. — Facts reviewed under which the court refused to enforce an alleged

trust under Rev. St. Ind., 1881, § 2959, providing that no trust concerning land except those arising by implication of law shall be created unless in writing, etc. — *Wright v. Moody*, S. C. Ind., Nov. 26, 1888; 18 N. E. Rep. 608.

202. TRUST—Evidence. — Sufficiency of evidence to establish a resulting trust on land of one whose mother had practically paid for it and though without her knowledge the title was in his name. — *Murphy v. Hanscome*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 717.

203. VENDOR AND VENDEE — Married Woman. — In an action by the married woman and her husband, after the reformation of the deed, against a purchaser, for the balance of the purchase money, a purchase by defendant of the remainder interest of the children, at a sale under a proceeding by their guardian, to which the married woman and her husband were not parties, and of which they had no knowledge, is no defense. — *Smoot v. Boyd*, Ky. Ct. App., Dec. 6, 1888; 9 S. W. Rep. 829.

204. VENDOR AND VENDEE—Rescission—Election. — A testator sold land, reserving a lien for the purchase money, and, default having been made in the payment, he obtained a judgment for the balance, and was seeking to collect it by execution, when he was enjoined by the purchaser: *Held*, that the testator had elected to enforce his right to the unpaid purchase money, and, it not appearing that he attempted to rescind the contract, and claim the land, on being enjoined, he had no title thereto. — *Summerhill v. Hanner*, S. C. Tex., Dec. 7, 1888; 9 S. W. Rep. 881.

205. VENDOR AND VENDEE—Purchase Price. — One sued for the price of land 13 years after its conveyance to him cannot defend on the ground that the transaction was in fraud of the grantor's creditors, he having had full control and enjoyment of the land ever since the conveyance. — *Allen v. Merriweather*, Ky. Ct. App., Dec. 1, 1888; 9 S. W. Rep. 807.

206. WILLS — Probate. — The probate of a will in another State affecting lands in Texas is not notice of its existence or contents to parties in the latter State, notwithstanding act March 23, 1887. — *Staton v. Singleton*, S. C. Tex., Dec. 4, 1888; 9 S. W. Rep. 876.

207. WILLS—Construction—Devisee. — Construction of will providing for the distribution "equally among the children I may then have or those who may be legally entitled thereto" and in another clause that "if any one of my said children or any person who may succeed to the interest of them interferes with the execution of the will he shall forfeit his share." — *In re Paton*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 625.

208. WILLS — Construction. — A direction in a will that certain out-lands "shall be sold and the proceeds, together with my personal property, shall go to the payment of all my debts and legacies, and, if that should be insufficient, so much of the saw-mill pasture shall be sold as shall be necessary," operates a conversion of such out-lands into personal property at the time of the testator's death. — *Perkins v. Coughlin*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 600.

209. WILLS—Construction—Advancement. — Construction of will providing for deduction of advancements to children. — *In re Robert's Estate*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 843.

210. WITNESS — Impeachment. — The prosecutrix testified that defendant was sober when he shot her. Defendant offered to show that soon after the shooting she said that it was not defendant, but a man crazy from the use of liquor, who shot her: *Held*, that, as defendant might have been crazy from liquor, and yet sober at the time of shooting, the offer was properly refused. — *Wagner v. State*, S. C. Ind., Nov. 26, 1888; 18 N. E. Rep. 633.